INDEX.

	Page
OPINIONS OF THE COURTS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	3
STATEMENT UNDER RULE 33(b)(2)	3
STATEMENT OF THE CASE	4
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT	5
I. The Dismissal of the Cause of Action for Unseaworthiness Was a Final Order for the Purpose of Appeal, Under This Court's Decision in Gillespie v. United States Steel Corp., 379 U. S. 148	5
II. The Elimination of the Warranty of Seaworthiness in the Amendment to the Longshoremen's and Harbor Workers' Compensation Act Destroyed a Vital Part of the Maritime Law, in Violation of Article III, Section 2 of the Constitution of the United States, and Is Directly Contrary to Panama R. R. v. Johnson, 264 U. S. 375	7
CONCLUSION	10
APPENDIX A—Statutory Provisions Involved	A1
APPENDIX B—Order of the Court of Appeals filed April 30, 1975	A3
APPENDIX C—Order of the District Court for the Eastern District of Pennsylvania filed December 30, 1974	A5
APPENDIX D—Opinion of the District Court for the Eastern District of Pennsylvania filed December 30, 1974	A7
APPENDIX E—Order of the District Court for the Eastern District of Pennsylvania filed January 21, 1975 denying motion for certification of order of December 30, 1974	A18

TABLE OF CASES CITED.

	Page
Gillespie v. United States Steel Corp., 379 U. S. 148, 13 L. Ed. 2d 199 (1964)	5, 6
International Stevedoring Co. v. Haverty, 272 U. S. 50, 71 L. Ed. 157 (1926)	7
Mahnich v. Southern S. S. Co., 321 U. S. 96, 88 L. Ed. 561 (1944)	7
Moragne v. States Marine Lines, Inc., 398 U. S. 375, 26 L. Ed. 2d 339 (1970)	5
Panama R. R. v. Johnson, 264 U. S. 375, 68 L. Ed. 748 (1924)	8, 10
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099 (1946)	7

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Act of March 4, 1927, c. 509, § 5, 44 Stat. 1426, as amended October 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263, 33 U. S. C. § 905(b)	3
Jones Act, 46 U. S. C. A. 688	5, 8, 9
Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 905(b)	3, 4, 10
Rule 33(b)(2)	3
United States Constitution, Article III, Section 2	7, 8
28 U. S. C. A. § 1254(1)	2
28 U. S. C. A. § 1291	3, 5
28 U. S. C. A. § 1651	2
28 U. S. C. § 2403	3

IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1975.

—

No. 75- .

—

ROBERT H. LUCAS,

Petitioner,

v.

"BRINKNES" SCHIFFAHRTS GES.
FRANZ LANGE G.m.B.H. & CO.,

v.

NORTHERN METAL CO.,

Respondents.

—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

———

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Robert H. Lucas, respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit, entered in the above case on April 30, 1975, granting respondents' motion to dismiss petitioner's appeal from an order of the United States District Court for the Eastern District of Pennsylvania.

OPINIONS OF THE COURTS BELOW.

The United States Court of Appeals for the Third Circuit did not grant any hearing and filed no opinion in support of its Order of April 30, 1975, which granted respondents' motion to dismiss the appeal. Said Order is printed, *infra* (Appendix B, p. A3). The Order of the United States District Court for the Eastern District of Pennsylvania, filed January 21, 1975, denying motion for certification of order of December 30, 1974, is unreported. Said Order is printed, *infra* (Appendix E, p. A18). The Opinion of the United States District Court for the Eastern District of Pennsylvania, filed December 30, 1974, is unreported. Said Opinion is printed, *infra* (Appendix D, p. A7). The Order of the United States District Court for the Eastern District of Pennsylvania, filed December 30, 1974, denying plaintiff's motion to strike defendants' affirmative defense and denying defendants' motion for certification, is unreported. Said Order is printed, *infra* (Appendix C, p. A5).

JURISDICTION.

The Order of the United States Court of Appeals for the Third Circuit dismissing petitioner's appeal was entered on April 30, 1975, *infra* (Appendix B, p. A3). The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1) and the All Writs Statute, 28 U. S. C. A. § 1651.

QUESTIONS PRESENTED.

1. Whether the Trial Court's order dismissing the cause of action based on the warranty of seaworthiness was final and subject to appeal.

2. Whether the statute which eliminated the warranty of seaworthiness was in violation of the United States Constitution and, therefore, invalid.

STATUTES INVOLVED.

The statutory provisions involved are 28 U. S. C. A. § 1291; and 33 U. S. C. A. § 905(b). Said provisions are printed, *infra* (Appendix A, p. A1).

STATEMENT UNDER RULE 33(b)(2).

Since the proceeding draws into question the constitutionality of the Act of March 4, 1927, c. 509, § 5, 44 Stat. 1426, as amended October 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263, 33 U. S. C. § 905(b), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U. S. C. § 2403 may be applicable.

The United States District Court for the Eastern District of Pennsylvania has, on December 4, 1974, pursuant to 28 U. S. C. § 2403, certified to the Attorney General of the United States the fact that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE.

On January 26, 1973, petitioner, while engaged in unloading the S/S "Brinknes", stepped on a timber holding the cargo, when the timber broke, causing him to fall and sustain serious injury. Petitioner alleged in his complaint that the injuries were due (1) to the cause of action based on unseaworthiness; and (2) to the cause of action based on negligence. Respondents averred in reply that the cause of action for unseaworthiness was barred by the amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 905(b). Petitioner moved to strike defendants' affirmative defense, and this motion was denied by the trial court. Petitioner then filed a motion to certify the order denying petitioner's motion to strike and this motion was denied. Petitioner appealed to the United States Court of Appeals for the Third Circuit, and respondents moved to dismiss the appeal on the ground that the order of the District Court was interlocutory. Respondents' motion dismissing the appeal was granted on April 30, 1975.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Dismissal of the Cause of Action for Unseaworthiness Was a Final Order for the Purpose of Appeal, Under This Court's Decision in Gillespie v. United States Steel Corp., 379 U. S. 148.

In *Gillespie v. United States Steel Corp.*, 379 U. S. 148, 13 L. Ed. 2d 199 (1964), the administratrix filed a complaint for the death of her son, under the Jones Act, 46 U. S. C. A. 688, and under the Ohio Wrongful Death Act, for negligence and unseaworthiness. On motion to dismiss before trial, the district court struck all parts of the complaint referring to unseaworthiness and left standing the negligence count. This decision was affirmed by the Court of Appeals and by this Court, holding that the decision dismissing the cause of action for unseaworthiness was a "final" one for the purpose of appeal.[1] In determining the "finality" of the order dismissing the count for unseaworthiness and holding it to be "final" under 28 U. S. C. A. 1291, this Court stated:

> ". . . [T]he requirement of finality is to be given a 'practical rather than a technical construction.' . . . It is true that the review of this case by the Court of Appeals could be called 'piecemeal'; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered." (U. S. at 152-53, L. Ed. at 203)

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1. The decision on the merits was subsequently reversed by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375, 26 L. Ed. 2d 339 (1970), where this Court held that a cause of action for death arose under the general maritime law.

Moreover, this Court went even further than it need go in this case, stating:

> "Furthermore, in United States v. General Motors Corp., 323 U. S. 373, 377, 89 L. ed. 311, 318, 65 S. Ct. 357, 156 ALR 390, this Court contrary to its usual practice reviewed a trial court's refusal to permit proof of certain items of damages in a case not yet fully tried, because the ruling was 'fundamental to the further conduct of the case.' For these same reasons this Court reviewed such a ruling in Land v. Dollar, 330 U. S. 731, 734, note 2, 91 L. ed. 1209, 1214, 67 S. Ct. 1009, and Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 685, note 3, 93 L. ed. 1628, 1633, 69 S. Ct. 1457, where, as here, the case had not yet been fully tried. And see Cohen v. Beneficial Industrial Loan Corp., supra, 337 U. S., at 545-547, 93 L. ed. at 1535, 1536. We think that the questions presented here are equally 'fundamental to the further conduct of the case.'" (U. S. at 153-54, L. Ed. at 203-04)

Clearly, the Court below should have taken jurisdiction and decided the merits for the reasons advanced by this Court in *Gillespie* (1) that the term "final" must be given a practical rather than a technical construction; and (2) because the issues presented here are fundamental to the conduct of the case.

II. The Elimination of the Warranty of Seaworthiness in the Amendment to the Longshoremen's and Harbor Workers' Compensation Act Destroyed a Vital Part of the Maritime Law, in Violation of Article III, Section 2 of the Constitution of the United States and Is Directly Contrary to Panama R. R. v. Johnson, 264 U. S. 375.

The warranty of seaworthiness was held to apply generally to seamen in this Court's decision in *Mahnich v. Southern S. S. Co.*, 321 U. S. 96, 88 L. ed. 561 (1944). There, this Court held:

> ". . . [T]he admiralty rule that the vessel and owner are liable to indemnify a seaman for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in The Osceola, supra (189 U. S. 175, 47 L. ed. 764, 23 S. Ct. 483); . . ." (U. S. at 99, L. ed. at 564)

The term "seaman" was held by this Court to include longshoremen and others performing the services of seamen on board ship. *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 71 L. ed. 157 (1926).

The question as to whether longshoremen were "seamen", entitled to the warranty of seaworthiness, was decided in the affirmative by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 L. ed. 1099 (1946). There, this Court held:

> "That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them

to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault." (U. S. at 93, L. ed. at 1105).

This brings us to the key question of whether the changing of a vital part of the maritime law may be done by statute. In *Panama R. R. v. Johnson*, 264 U. S. 375, 68 L. ed. 748 (1924), the Jones Act, 46 U. S. C. A. 688, which enhanced the cause of action for negligence under the maritime law, was challenged by the shipowner on the ground that the maritime law could not be modified or changed except by Constitutional amendment. In reviewing the law, this Court pointed out in *Panama* that by Article III, Section 2, the Constitution of the United States adopted and incorporated the general maritime law.

> "As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in colonial times and during the Confederation, and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce.

> In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States,—subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject, and permits of the exercise of a wide discretion." (U. S. at 385-86, L. ed. at 752.)

At this point, this Court defined the boundaries within which Congress may act to alter the maritime law as stating that it could not by legislation exclude anything falling clearly within the law, or include anything falling clearly without, as follows:

> ". . . [T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and *cannot be altered by legislation, as by excluding a thing falling clearly within them, or including a thing falling clearly without.*" (U. S. at 386, L. ed. at 752.) (Emphasis supplied.)

In holding the Jones Act constitutional, this Court stated that the Act did not change the characteristic features of the maritime law:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules, drawn from another system, and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system." (U. S. at 388-89, L. ed. at 753.)

The warranty of seaworthiness is one of the most vital features of the maritime law, and its elimination necessarily is in conflict with and destructive of the maritime law, completely contrary to the mandate of this Court in *Panama R. R. v. Johnson, supra.* The amendment to the Longshoremen's and Harbor Workers' Compensation Act, insofar as it eliminated the warranty of seaworthiness, is in direct violation of the Constitution of the United States and must, therefore, be held invalid.

CONCLUSION.

The decision below will erroneously result in the dismissal of many thousands of longshoremen's cases around the country every year. Certiorari is absolutely essential to the end that the decision be reviewed by this Court, in order that justice be done. Certiorari should be granted, and the decision below reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
FREEDMAN, BOROWSKY AND LORRY,
Counsel for Petitioner.

APPENDIX A.

28 U. S. C. A.

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

33 U. S. C. A.

§ 905(b). In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the

injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.
As amended Oct. 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1223-4

April 18, 1975

ROBERT H. LUCAS,
Appellant in No. 75-1223

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.m.b.H. & Co., K.G.

v.

NORTHERN METAL COMPANY (3RD PTY. DEFT.)
"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.M.B.H. & CO., K.G., DEFENDANT-THIRD PARTY PLAINTIFF,
Appellant in No. 75-1224

(D. C. Civil No. 73-1120)

Present: VAN DUSEN, ADAMS and GARTH, *Circuit Judges.*

1. Motion by Cross-appellant, "Brinknes" Schiffahrts Ges. Franz Lange G.m.b.H. & Co., K.G., to dismiss appeal of appellant in No. 75-1223, Robert H. Lucas, *or,* in the alternative, to extend time for filing brief and the appendix until 40 days after the Court has acted on this motion, *and* further moves this Court for an Order dismissing all of the appeals in Nos. 75-1220, 75-1221, 75-1223

and 75-1224, and remanding the records to the District Court for further proceedings leading to a final judgment to be entered by the District Court,

2. Answer by appellant in No. 75-1223, Robert H. Lucas, to motion by Cross-appellant to dismiss appeal in No. 75-1223,

3. Answer by appellee, Northern Metal Company, to motion of Cross-appellant to dismiss appeals, stating supports motion to dismiss appeals in Nos. 75-1220, 75-1221, 75-1223 and 75-1224,

in the above listed for Monday, April 28, 1975.

Respectfully,

/s/ THOMAS F. QUINN
Clerk

enc.
fm

P.S. On April 15, 1975 the Clerk granted Stipulation of counsel that the decision in No. 75-1223 will be binding upon Nos. 75-1220 and 75-1221, D. C. Civil No. 73-2150.

The foregoing Motion is granted and the records are remanded to the district court.

By THE COURT,

/s/ VAN DUSEN
Judge

Dated: April 30, 1975

APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-1120

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE
G.M.B.H. & CO. K.G.

v.

NORTHERN METAL CO.

CIVIL ACTION NO. 73-2150

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL CO.

ORDER.

Now, December 30, 1974, IT IS ORDERED:

In Civil Actions Nos. 73-1120 and 73-2150,

(a) the motion of plaintiffs to strike the defendants' affirmative defense denying liability under the warranty of seaworthiness is DENIED.

(b) the motion of defendants for certification to the Third Circuit under 28 U. S. C. § 1292(b) is DENIED.

/s/ JOSEPH S. LORD, III,
Joseph S. Lord, III,
Ch. J.

/s/ ALFRED L. LUONGO,
Alfred L. Luongo,
J.

/s/ DANIEL H. HUYETT, 3RD,
Daniel H. Huyett, 3rd
J.

APPENDIX D.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-1120

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.M.B.H. & Co., K.G.

v.

NORTHERN METAL CO.

CIVIL ACTION NO. 73-2150

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL CO.

BEFORE: JOSEPH S. LORD, III, *Chief Judge*
ALFRED L. LUONGO, *Judge*
DANIEL H. HUYETT, 3RD, *Judge* *

* A panel of three District Court judges was convened by Chief Judge Lord to consider these cases because of the number of cases pending in the Eastern District of Pennsylvania which have issues identical to the issues raised in these cases. This procedure will provide for uniformity of treatment of the issues involved even though a single district judge is not actually bound by our ruling in these cases. *See Turner v. Transportacion Maritima Mexicana S. A.*, 44 F. R. D. 412, 414 n. 1 (E. D. Pa. 1968).

OPINION.

HUYETT, *J.* December 30, 1974

Before us is a series of motions [1] in two admiralty actions arising out of shipboard injuries to longshoremen. These motions test the constitutionality of 33 U. S. C. § 905(b),[2] one of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. amended (Supp. II 1972).

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1. In an earlier memorandum resolving another series of pretrial motions filed in these actions, *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G. m. B. H. & Co., K. G.*, 379 F. Supp. 759 (E. D. Pa. 1974), we held that § 905(b) of Title 33, as amended, precluded any actions for indemnity or contribution by shipowners against stevedores arising out of injuries to the stevedores' employees. For a discussion of the history of the different rights and remedies treated in the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. as amended (Supp. II 1972), *see Lucas I* at 761-65.

2. 33 U. S. C. § 905(b) as amended (Supp. II 1972) reads:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair service to the vessel. *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.* The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter. (Emphasis added)

MOTION TO STRIKE.

By a motion to strike defendant shipowners' affirmative defense denying liability under the warranty of seaworthiness, plaintiffs question the power of Congress to eliminate through § 905(b) a longshoreman's right to recover under the warranty of seaworthiness conferred on him in *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946). We deny the motion to strike.

Plaintiffs argue that Congress exceeded its constitutional authority under Article III, section 2,[3] when it eliminated the warranty of seaworthiness as a basis upon which longshoremen can recover.[4] Their argument relies heavily on the following excerpt from a passage in *Panama Railway Co. v. Johnson*, 264 U. S. 375, 386 (1924):

> [T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without.

Plaintiffs point out that this language of limitation is echoed in subsequent Supreme Court cases.[5] Such limiting

3. Article III, section 2, reads in part:

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.

4. The Supreme Court first afforded seamen the right to recover under a warranty of seaworthiness in *The Osceola*, 189 U. S. 158 (1903). To recover under the warranty, however, the seaman had to establish that the shipowner had breached a duty of reasonable care and that his injury did not result from the negligence of the master or crew. In 1944, the Court transformed the liability arising from a breach of the warranty of seaworthiness into an absolute, non-delegable liability. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96 (1944). Then, two years later the Court granted longshoremen the right to recover under a warranty of seaworthiness. *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946).

5. In *Crowell v. Benson*, 285 U. S. 22 (1932), the Supreme Court upheld the constitutionality of the original Longshoremen's

language, plaintiffs contend, precludes Congress from eliminating this "most substantial and most important" admiralty remedy, the warranty of seaworthiness.[6]

Since plaintiffs rely so strongly on *Panama Railway Co. v. Johnson*, we start by examining the lengthy passage

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5. (Cont'd.)

and Harbor Workers' Compensation Act of 1927, 33 U. S. C. § 901 et seq. (1970). The Court quoted the following language from Chief Justice Taney's opinion in *The Genesee Chief*, 53 U. S. (12 How.) 443, 459 (1851):

> But the extent of the power as well as the mode of proceeding in which [admiralty] jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language.

285 U. S. at 53. In *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21 (1934), the Court upheld the Ship Mortgage Act, 46 U. S. C. §§ 911-984 (1970) (§ 973 as amended (Supp. I 1971)), which conferred on federal admiralty courts jurisdiction over actions to enforce the lien of a "preferred" mortgage on a ship, the term "preferred" being defined by the Act. The Court concludes a paragraph in which it outlines the broad power of Congress to determine maritime law by stating:

> But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction.

293 U. S. at 44.

6. Plaintiffs seem to suggest that the lineage and antiquity of the warranty of seaworthiness are so compelling that Congress cannot, constitutionally exclude it. At the risk of mentioning the obvious, we note that the Supreme Court did not feel compelled to grant even a limited right of recovery under the warranty of seaworthiness until 1903. *The Osceola*, 189 U. S. 158 (1903). The warranty did not apply to longshoremen, the only group to which it has been denied under § 905(b), until 1946. *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946). On a grander scale, plaintiffs suggest that there exists, and existed at the time of the adoption of the Constitution, a core of substantive maritime law, including the warranty of seaworthiness, with which Congress cannot tamper. This notion we reject. We adopt the Supreme Court's statement in *The Lottawana*, 88 U. S. (21 Wall.) 558, 572 (1875), that "it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country."

from *Panama* of which the language cited by plaintiffs comprises a sentence. The passage begins with a long section in which the Court acknowledges the necessarily broad discretion of Congress to legislate in the area of substantive maritime law.[7] In discussing the nature of Article III, section 2, the Court states

> Although containing no express grant of legislative power over the substantive law, the provision [Article III, section 2] was regarded from the beginning as implicitly investing such power in the United States. Commentators took this view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superceded or as being only the law of the several States, but as having become the law of the United States, . . . subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion.

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7. Although there is no conflict among the Supreme Court cases on the broad discretion of Congress to enact maritime law, there is some disagreement as to where in the Constitution this power is grounded. The Court in *The Lottawana*, 88 U. S. (21 Wall.) 558, 577 (1875), found the source of congressional power to be Article I, section 8, cl. 3, the commerce clause. In *Panama Railway Co. v. Johnson*, 264 U. S. 382, 387 (1924), and *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 42 (1934), the Court found the source to be Article I, section 8, cl. 18, the necessary and proper clause. Finally, in *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 39 (1943), the Court identified both the commerce clause and the necessary and proper clause as the source of congressional power.

264 U. S. at 386. Immediately following this discussion, the Court does identify two constitutional limits on the legislative power. The first limit is the one invoked by plaintiffs—"that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects." *Id.* The second limit, and one the Court has acted upon, restrains Congress from enacting legislation which undermines the uniformity of maritime law and thereby contravenes the constitutional policy upon which a federal maritime law is based.

This second limit on the national Congress, and in one case on the New York legislature, led the Court to strike down several legislative schemes in a line of cases just prior to *Panama Railway Co. v. Johnson.* In *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917), *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920), and *Washington v. Dawson & Co.*, 264 U. S. 219 (1924), the Court declared unconstitutional under Article III, section 2, an attempt by the New York legislature and two attempts by the national Congress respectively to apply state workmen's compensation schemes to maritime injuries. The Court struck down these attempts because maritime law is constitutionally designated federal law and must be uniform wherever the Constitution reaches.

Plaintiffs do not suggest in their briefs that § 905(b) exceeds this second limit. They argue instead that denial to longshoremen of the warranty of seaworthiness exceeds the first limit, the one imposed by the inherent nature of the subject. With this theory we cannot agree. Despite

8. Although the *Panama* Court uses the phrase "maritime law and admiralty jurisdiction," we suspect the Court intended only to echo the constitutional phrase but inserted the word "law" for a nicer rhetorical balance. The Constitution refers only to "maritime and admiralty Jurisdiction." We cannot attribute to the Court's use of the word "law" the significance which the plaintiffs urge.

the use of the conjunctive "maritime law and admiralty jurisdiction" in the excerpt on which plaintiffs rely, we conclude that the language of limitation under discussion places boundaries on congressional power to expand and contract admiralty jurisdiction, not on its power to arrange and rearrange substantive maritime remedies.[9] We base our conclusion on several considerations. As we have already suggested, the language from *Panama Railway Co. v. Johnson* that plaintiffs cite is but a short excerpt from a long passage the predominant theme of which is the broad range of congressional discretion to alter and amend maritime law. This pattern, limiting language sounding a minor theme in a case in which the major theme is the wide-ranging congressional power to enact maritime law, is repeated in *Crowell v. Benson*, 285 U. S. 22 (1932), and *Deroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21 (1934), two other cases upon which plaintiffs rely. Further, in *Panama Railway Co. v. Johnson* and *Crowell v. Benson*, the Court upheld the federal legislation under constitutional attack despite thoroughgoing congressional rearrangement of substantive maritime remedies. In *Panama Railway v. Johnson* the Court upheld the consti-

9. We do not imply here that congressional discretion to expand or contract admiralty jurisdiction is narrowly restricted. In a line of cases in the first decade of this century, *Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.*, 203 U. S. 316 (1908); *The Troy*, 208 U. S. 321 (1908); and *Martin v. West*, 222 U. S. 191 (1911), the Supreme Court refused recovery in admiralty when a ship or its gear caused damage to persons ashore or to shore-based property. In 1948 Congress passed the Admiralty Extension Act 1948, 46 U. S. C. § 740 (1970), which in effect overruled this line of cases conferring jurisdiction in admiralty for these kinds of accidents. Although the Supreme Court has never ruled directly on the constitutionality of the Act, the Court in *Victory Carriers, Inc. v. Law*, 404 U. S. 202, 209-210 (1971), recounts this legal history with apparent equinimity and reports that "[t]he [Admiralty Extension Act] survived constitutional attack in the lower federal courts and was applied without question by this Court in *Gutierrez*. . . ." (citations omitted).

tutionality of the Jones Act, 46 U. S. C. § 688, which conferred on seamen a negligence remedy governed by "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees." In *Crowell v. Benson* the Court upheld the original Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. § 901 et seq., which created a federal workmen's compensation scheme for longshoremen. In fact, except for legislation struck down for undermining the uniformity of maritime law, plaintiffs cannot cite us a single case in which a congressional enactment of substantive maritime law was declared unconstitutional.

Finally, we note that the Supreme Court has explicitly recognized the peculiar appropriateness of the legislative process to striking the correct balance of substantive maritime remedies. In *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282 (1952), the Court held that since Congress had not approved a right of contribution between shipowners and shoreside contractors, the Court could not appropriately do so. In so holding, the Court said:

> We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run.

342 U. S. at 286; accord *United States v. Atlantic Mutual Insurance Co.*, 343 U. S. 236, 242 (1952). Our first opinion in this matter, *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G.*, 379 F. Supp. 759, 767-69 and appendix (E. D. Pa. 1974), discusses at length the shifting of weights, as revealed by the legislative history, which finally struck the balance represented by the 1972 Amend-

ments to the Longshoremen's and Harbor Workers' Compensation Act. After full legislative hearings at which representatives of all interested groups testified, Congress adjusted the previous balance of remedies toward the goal of a more humane and more equitable scheme. As we found in *Lucas I*, 379 F. Supp. at 766-67, the 1972 Amendments reveal themselves as a configuration in which the stevedore is strictly liable to his employee for increased workmen's compensation benefits. The stevedore, in turn, is protected against actions by shipowners for indemnity and contribution when a longshoreman is injured on the job through a shipowner's negligence. Finally, and this completes the configuration, the shipowner is no longer strictly liable to the longshoreman under the warranty of seaworthiness; only a simple, common-law negligence remedy remains available to the longshoreman against the shipowner. In light of our characterization of the 1972 Amendments, we note the recent case of *Burris v. Lavino Shipping Co.*, — F. 2d — (3d Cir. Oct. 30, 1974), Civil No. 74-1120, in which the Third Circuit, in dicta,[10] characterized the Amendments as:

> rationaliz[ing] the relative liabilities of shipowners and stevedores by replacing maritime concepts of liability with "a new cause of action for negligence in which a shipowner is not to be held liable as a third party unless the former's negligence was such as would render a land-based third party in non-maritime pursuits liable under similar circumstances" . . . .

(citation omitted).

---

10. In *Burris* the Third Circuit found that the 1972 Amendments did not apply because the accident giving rise to the action in federal court occurred prior to the effective date of the Amendments. *Burris v. Lavino Shipping Co.*, — F. 2d —, — and note 9 (3d Cir. 1974).

To summarize, then, we hold that in denying to longshoremen the right to recover under the warranty of seaworthiness in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, Congress has exceeded its power neither under the Constitution nor under the constitutional interpretation found in *Panama Railway v. Johnson*. The caution sounded in *Panama* is against extreme congressional tampering with the boundaries of admiralty jurisdiction, either territorial or subject matter jurisdiction. We agree that Congress may not, constitutionally, bring under the jurisdiction of a federal [illegible] court a completely land-based accident or tr[illegible]. Conversely, we concede that Congress cannot remove from admiralty jurisdiction those types of accidents which occur on navigable water since these are conceptually, traditionally, and constitutionally admiralty matters. This does not mean, however, that Congress may not amend or alter the substantive law of admiralty as long as it does not interfere with admiralty jurisdiction. Section 905(b) in no way encroaches upon the jurisdiction of the admiralty court; it merely defines rules of law to be applied. More specifically, the amendment provides that liability to a longshoreman may not be based upon the breach of the warranty of seaworthiness. It does not disturb the jurisdiction of a district court to entertain a suit by an injured longshoreman. Article III, section 2, does not reach the substantive law of admiralty but only the jurisdiction and the uniform application of its laws. Section 905(b) does nothing to either.

MOTION FOR CERTIFICATION.

Defendants-Third Party Plaintiffs move that we certify the constitutional question here decided to the Third Circuit. Section 1292(b) of Title 28 provides for such a

procedure but only when "there is substantial ground for difference of opinion and . . . an immediate appeal may materially advance the ultimate termination of the litigation." Since we find § 905(b) clearly constitutional, we necessarily find no "substantial ground for difference of opinion." Further, after this second long delay in the litigation occasioned by our preparing another memorandum resolving pretrial motions, we believe the best hope for "materially advanc[ing] the ultimate termination of the litigation" is to proceed with it in the district court.

CONDITIONAL MOTION FOR RECONSIDERATION.

Defendants-Third Party Plaintiffs move that in the event we find § 905(b) unconstitutional, we reconsider our decision in *Lucas I*. Obviously, we need not reconsider.

/s/ JOSEPH S. LORD, III,
Joseph S. Lord, III,
Ch. J.

/s/ ALFRED L. LUONGO,
Alfred L. Luongo,
J.

/s/ DANIEL H. HUYETT, 3RD,
Daniel H. Huyett, 3rd
J.

APPENDIX E.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-1120

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.M.B.H. & CO., K.G.

v.

NORTHERN METAL COMPANY

CIVIL ACTION NO. 73-2150

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL COMPANY

ORDER.

Now, January 21, 1975, upon consideration of plaintiff's motion in Civil Action No. 73-1120 for certification of the Order of December 30, 1974, under 28 U. S. C. § 1292(b) and the motions in Civil Action No. 73-1120 and No. 73-2150 of August 7, 1974, of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of August 5, 1974, and the motions for reconsideration in Civil Action No. 73-1120 and No. 73-2150 of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of the Court of August 5, 1974, the contentions of the parties and memoranda filed, IT IS ORDERED that:

1. Plaintiff's motion in Civil Action No. 73-1120 for certification of the Order of December 30, 1974, under 28 U. S. C. § 1292(b) is DENIED;

2. The motions in Civil Action No. 73-1120 and No. 73-2150 of August 7, 1974, of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of the Court of August 5, 1974 are DENIED; and

3. The motions for reconsideration in Civil Action No. 73-1120 and No. 73-2150 of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of the Court of August 5, 1974, are DENIED.

/s/ JOSEPH S. LORD, III
Joseph S. Lord, III
Ch. J.

/s/ ALFRED L. LUONGO
Alfred L. Luongo
J.

/s/ DANIEL H. HUYETT, 3RD
Daniel H. Huyett, 3rd
J.

INDEX.

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
I. Dismissal of Lucas' Motion to Strike Brinknes' Affirmative Defense That Lucas' Cause of Action Based on Unseaworthiness Is Barred by the Longshoremen's and Harbor Workers' Compensation Act Is Not a Final Order and the Court of Appeals Was Correct in Dismissing Lucas' Appeal From Said Order	5
II. The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act Neither Exceed the Authority of Congress Nor Narrow the Admiralty Jurisdiction of the Courts	7
CONCLUSION	12

TABLE OF CASES CITED.

	Page
Butler v. Boston and Savannah Steamship Co., 130 U. S. 527, 32 L. Ed. 1017 (1889)	9
Detroit Trust Co. v. Steamer "Thomas Barlum", 293 U. S. 21, 79 L. Ed. 176 (1934)	10
Gillespie v. United States Steel Corp., 379 U. S. 148, 13 L. Ed. 2d 199 (1964)	7, 8
National Steam Navigation Co. v. Dyer, 105 U. S. 24, 26 L. Ed. 1001 (1882)	9
Panama Railroad Co. v. Johnson, 264 U. S. 375, 68 L. Ed. 748 (1924)	8, 10, 11
Reid v. Hearst, 88 U. S. 568, 22 L. Ed. 654 (1875)	11

INDEX OF STATUTES AND AUTHORITIES CITED.

	Page
Death Act, 46 U. S. C. A. §688	6, 8
Limitation of Liability Act of 1851, 9 Stat. at L. 635 Ch. 43, 46 U. S. C. §182	6, 9
Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 et seq.	2
Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §905(b)	2
28 U. S. C. A. §1291	2, 5, 7, 12
28 U. S. C. A. §1292(b)	2, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-75

ROBERT H. LUCAS,

Petitioner,

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.m.B.H. & CO. K.G.

v.

NORTHERN METAL CO.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Respondent, Northern Metal Co., respectfully prays that Lucas' Petition for Writ of Certiorari be denied.

QUESTIONS PRESENTED.

1. Was Lucas' appeal to the Court of Appeals from an Order of the United States District Court for the Eastern District of Pennsylvania which denied his Motion to Strike an affirmative defense pleaded by Brinknes an appeal from a final Order as required by 28 U. S. C. A. § 1291?

2. Do the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act exceed the power of Congress or limit the admiralty jurisdiction of the federal courts?

STATEMENT OF THE CASE.

Robert H. Lucas, petitioner herein, filed a complaint in the United States District Court for the Eastern District of Pennsylvania against "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. and Co., K.G., alleging that he sustained injuries while working aboard the S/S BRINKNES as a longshoreman on January 26, 1973. Causes of action based on unseaworthiness and on negligence were set forth in the complaint.

Brinknes filed a third-party complaint against Northern Metal Co., which, at the time of the accident described in Lucas' complaint, was Lucas' stevedore-employer. Northern Metal filed a motion to dismiss the third-party action, alleging that said action was barred by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 905(b), as amended in October, 1972. The District Court granted Northern Metal's motion on August 5, 1974.

Lucas then moved, in the District Court, to strike an affirmative defense asserted by Brinknes that the cause of action based on unseaworthiness was barred by the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U. S. C. A. § 901 et seq.). This motion was denied by an Order of the District Court dated December 30, 1974. The Court, at the same time, denied motions by Brinknes for reconsideration or for certification for immediate appeal of its Order of August 5, 1974, which dismissed the third-party complaint which Brinknes had filed against Northern Metal.

Lucas moved, pursuant to 28 U. S. C. A. § 1292(b), to certify for immediate appeal the Order of the District Court which denied its motion to strike Brinknes' affirmative defense. The motion for certification was denied in an Order of the District Court dated January 21, 1975.

The District Court, in the same Order, denied motions by Brinknes for certification and for reconsideration for certification of the Court's Order of August 5, 1974, dismissing Brinknes' third-party complaint.

Lucas thereafter appealed to the United States Court of Appeals for the Third Circuit from the dismissal of his motion to strike Brinknes' affirmative defense. The Court of Appeals, on motion of Brinknes, supported by Northern Metal, dismissed Lucas' appeal in an order dated April 28, 1975.

ARGUMENT.

I. The Order Dismissing Lucas' Motion to Strike Brinknes' Affirmative Defense That Lucas' Cause of Action Based on Unseaworthiness Is Barred by the Longshoremen's and Harbor Workers' Compensation Act Is Not a Final Order and the Court of Appeals Was Correct in Dismissing Lucas' Appeal From Said Order.

Lucas bases his petition for certiorari on 28 U. S. C. A. § 1291, which provides that Courts of Appeals shall have jurisdiction of appeals from all "final" decisions of the District Courts of the United States. The Order of the District Court refusing to strike Brinknes' affirmative defense, however, is not a final order within the meaning of 28 U. S. C. A. § 1291. Lucas himself recognized that the Court's Order was not final when he moved for certification of that Order for immediate appeal pursuant to 28 U. S. C. A. § 1292(b), which establishes special provisions for appealing orders "not otherwise appealable" which involve controlling questions of law as to which there is substantial ground for difference of opinion. The District Court denied the motion for certification and it was only then that Lucas claimed that the District Court's Order refusing to strike Brinknes' affirmative defense was a final order which could be appealed pursuant to 28 U. S. C. A. § 1291. The Order of the District Court is not a final order for purposes of appeal and the refusal of the Court of Appeals to hear Lucas' appeal from that Order was proper.

In *Gillespie v. United States Steel Corp.*, 379 U. S. 148, 13 L. Ed. 2d 199 (1964), cited by Lucas in support of his contention that the District Court's Order in the instant case was final, the Court of Appeals and this Court

affirmed dismissal by a District Court of the plaintiffs' cause of action for unseaworthiness. This is clearly and obviously different from refusal to strike an affirmative defense. In *Gillespie*, a cause of action was eliminated from the case prior to trial; in the instant case, all issues have been preserved as a result of the decision of the District Court. All issues in the present case having been preserved for subsequent determination, the District Court's Order is not final.

Moreover, the complaint in *Gillespie* was filed by the mother of a deceased seaman, as administratrix of his estate, to recover for herself and for the decedent's dependent brother and sisters. The brother and sisters were not entitled to a Jones Act recovery while their mother was living; the court's decision to strike the claims based on unseaworthiness from the complaint therefore completely eliminated the brother and sisters from the litigation arising out of their brother's death. The Court stated at page 153 of its opinion:

> . . . [D]elay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. And while their claims are not formally severable so as to make the court's order unquestionably appealable as to them [citation omitted], there certainly is ample reason to view their claims as severable in deciding the issue of finality, particularly since the brother and sisters were separate parties in the petition for extraordinary relief. [Citations omitted.]

Lucas' claims for recovery, in the instant case, have not been cut off by the District Court's refusal to strike

Brinknes' affirmative defense. His claim based on Brinknes' negligence is unaffected by the District Court's ruling or by the refusal of the Court of Appeals to hear an appeal from that ruling at the present time.

The District Court declined, on Lucas' petition, to certify for immediate appeal its Order refusing to strike Brinknes' affirmative defense and the Court of Appeals, on Brinknes' motion which was supported by Northern Metal, struck Lucas' appeal from that Order. Two courts have concluded that an appeal from the District Court's refusal to strike an affirmative defense set forth by Brinknes does not lie at the present time. Lucas has not provided any basis for a contrary determination by this Court. The Order of the District Court is interlocutory and, as the Court of Appeals held, it cannot be appealed pursuant to 28 U. S. C. A. § 1291.

II. The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act Neither Exceed the Authority of Congress Nor Narrow the Admiralty Jurisdiction of the Courts.

The issue of the constitutionality of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act raised by Lucas in his petition cannot properly be placed before this Court by an appeal from the refusal by the District Court to strike Brinknes' affirmative defense that Lucas' cause of action based on unseaworthiness is barred by the Act, as amended. Moreover, it is clear that enactment of the amendments did not exceed Congress' authority or limit the admiralty jurisdiction of the federal courts.

Lucas argues that the provisions of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act which eliminate the longshoremen's

judicially-created unseaworthiness remedy are an unconstitutional narrowing of the maritime jurisdiction of the courts. In support of this proposition, he relies on dicta in the numerous cases, upholding the power of Congress to change admiralty law by legislation, which purport to prohibit congressional action affecting the maritime jurisdiction of the courts. The case law does not support Lucas' reasoning nor the conclusion he seeks to draw from it.

The language from *Panama Railroad Co. v. Johnson,* 264 U. S. 375, 68 L. Ed. 748 (1923) cited by Lucas for the proposition that the maritime jurisdiction of the courts may not be altered by legislation is belied by the result in that case and the results of the numerous other cases upholding congressional modification of substantive maritime law which significantly altered the maritime jurisdiction of the courts. In *Panama,* this Court upheld the provisions of the Jones Act, which substantially increased the rights and remedies of injured seamen, despite appellant's argument that the Act was unconstitutional because it was destructive of the admiralty and maritime jurisdiction of the courts of the United States.

It cannot be contended that the Supreme Court has acquiesced to an extension of its jurisdiction only to accomplish humanitarian objectives. The Limitation of Liability Act of 1851 (9 Stat. at L. 635 Ch. 43, 46 U. S. C. § 182) was enthusiastically upheld despite the fact that it substantially limited the remedies of libellants, seamen included, against shipowners, and thus narrowed the maritime jurisdiction of the courts. The limitation of liability of shipowners was upheld although it was a concept created by Congress and not by the general maritime law. *National Steam Navigation Co. v. Dyer,* 105 U. S. 24, 26 L. Ed. 1001 (1882).

In *Butler v. Boston and Savannah Steamship Co.*, 130 U. S. 527, 32 L. Ed. 1017 (1889), this Court considered the genesis and legality of the Limitation of Liability Statute before affirming its constitutionality. It stated at page 555:

> The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is coextensive, in its operation, with the whole territorial domain of that law. [Citations omitted.] In *The Lottawanna* we said: "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power if no other, to introduce such changes as are likely to be needed." p. 577 [663]. . . . In *The Scotland* this language was used: "But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which through the Act of Congress, we have announced that we propose to administer justice in maritime cases." p. 31 [1003]. Again, in the same case, p. 29, we said: "But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawanna*, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the maritime law had never been adopted in this country until it was enacted by statute. Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law."

* * *

> These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, whilst the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as Congress may see fit to adopt. One of the modifications of the maritime law, as received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our Maritime Code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National Legislature, and not in the State Legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. [Citation omitted.] But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted.

In *Detroit Trust Co. v. Steamer "Thomas Barlum"*, 293 U. S. 21, 79 L. Ed. 176 (1934), this Court stated at page 43:

> When the Constitution was adopted, the existing maritime law became the law of the United States "subject to power in Congress to modify or supplement it as experience or changing conditions might require." *Panama R. Co. v. Johnson*, 264 U. S. 375, 385-387, 68 L. ed. 748, 752, 753, 44 S. Ct. 391.

The provisions of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act which have been challenged by Lucas do not offend the judicial power of this Court over maritime matters. The language cited by Lucas from the case of *Panama Railroad Co. v. Johnson, supra,* merely reiterates the Constitutional mandate that the maritime jurisdiction of the Court be immune from congressional modification. The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act do not alter that jurisdiction. Those Amendments merely withdraw from longshoremen a judicially-created remedy against the shipowner for breach of a warranty of seaworthiness. They do not disturb the warranty of seaworthiness as it relates to others, but merely prohibit its invocation in favor of injured longshoremen as an integral part of the revised compensation scheme created by Congress. Congress' modifications of the substantive maritime law do not change the admiralty jurisdiction of the courts.

The observations of Mr. Justice Bradley in *Rodd v. Heartt,* 88 U. S. 558, 22 L. Ed. 654 (1875), are helpful to an understanding of the role of the courts in construing legislative schemes affecting the maritime law. He stated at page 576:

> But we must always remember that the court cannot make the law; it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the Legislative Department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.

The traditional admiralty and maritime jurisdiction extending the power of the federal courts to all cases involving navigable waters remains unchanged by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Congress merely rewrote a portion of the substantive admiralty law to be applied and construed by the federal courts in the exercise of their jurisdictional power. That Congress has the constitutional power to amend the substantive maritime law is not controverted. Indeed, the courts have uniformly recognized the constitutional power of Congress in a changing world to update admiralty law. It must be concluded, therefore, that the changes effected by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act are a lawful exercise of that power.

CONCLUSION.

Dismissal by the United States District Court for the Eastern District of Pennsylvania of Lucas' Motion to Strike Brinknes' affirmative defense that Lucas' claim based on unseaworthiness is barred by the Longshoremen's and Harbor Workers' Compensation Act is an interlocutory Order. The District Court's ruling does not constitute a final order from which an appeal can be taken pursuant to 28 U. S. C. A. § 1291. The United States Court of Appeals for the Third Circuit properly dismissed Lucas' appeal from the District Court's Order.

A petition for certiorari from dismissal of an appeal of a District Court Order refusing to strike an affirmative defense is not a proper means for bringing before this Court the issue of the constitutionality of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. If the Court should elect to consider the

constitutionality of the Amendments to the Act, it is respectfully submitted that said Amendments are constitutional. Congress has the authority to modify or supplement the general maritime law as experience or changes in conditions require. Its passage of amendments to the Longshoremen's and Harbor Workers' Compensation Act in 1972 was clearly within that authority. Congress has not, in any respect, limited the traditional admiralty jurisdiction of the federal courts.

Respectfully submitted,

LEWIS WEINSTOCK,
LABRUM AND DOAK,
Counsel for Respondent,
Northern Metal Co.

INDEX.

	Page
Opinions of the Courts Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	3
Statement Under Rule 33(b)(2)	3
Statement of the Case	4
Argument	5
I. The Refusal to Strike the Respondent Shipowner's Defense Based Upon the 1972 Amendment Was an Interlocutory Order and Therefore Not Appealable	5
II. Elimination by Congress of the Warranty of Seaworthiness Was Clearly Within Its Constitutional Mandate to Legislate With Regard to Maritime Law and Admiralty Jurisdiction	7
Conclusion	11
Appendix A—Constitutional and Statutory Provisions Involved	A1
Appendix B—Order of the Court of Appeals Filed April 30, 1975	A2
Appendix C—Order of the District Court for the Eastern District of Pennsylvania Filed January 21, 1975 Denying Motion for Certification of Order of December 30, 1974	A4
Appendix D—Order of the District Court for the Eastern District of Pennsylvania Filed December 30, 1974	A6
Appendix E—Opinion of the District Court for the Eastern District of Pennsylvania Filed December 30, 1974	A8
Appendix F—Order of the District Court for the Eastern District of Pennsylvania Filed August 5, 1974	A19

INDEX (Continued).

Page

APPENDIX G—Opinion of the District Court for the Eastern District of Pennsylvania Entered August 5, 1974 (379 F. Supp. 759) A21

APPENDIX H—Report of Pre-Trial Conference and District Judge Luongo's Orders A50

TABLE OF CASES CITED.

	Page
Gillespie v. U. S. Steel Corp., 379 U. S. 148 (1964)	6
Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282 (1952)	9
La Bourgogne, 210 U. S. 95 (1907)	5
Panama R. R. Co. v. Johnson, 264 U. S. 375 (1924)	7, 8
Reed v. S. S. Yaka, 373 U. S. 410 (1963)	8
Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124 (1956)	8
Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946)	8

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901 *et seq.*:	
33 U. S. C. A. § 905(b)	3, 4, 10
1972 Amendments	11
Rule 33(b)(2)	3
United States Constitution, Article III, Sec. 2	3, 7, 10
28 U. S. C. A. § 1254	2
28 U. S. C. A. § 1291	3, 5
28 U. S. C. A. § 1292(b)	5
28 U. S. C. A. § 1332	4
28 U. S. C. A. § 2403	3

IN THE

Supreme Court of the United States

No. 75-75.

ROBERT H. LUCAS,

Petitioner,

v.

"BRINKNES" SCHIFFAHRTS GES.
FRANZ LANGE G.m.B.H. & CO.,

v.

NORTHERN METAL CO.,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., respectfully prays that the Writ sought by petitioner, Docket No. 75-75, to review an Order of the United States Court of Appeals for the Third Circuit be Denied.

OPINIONS OF THE COURTS BELOW.

The United States Court of Appeals for the Third Circuit did not grant any hearing and filed no opinion in support of its Order of April 30, 1975, which granted

Respondent's motion to dismiss the appeal. Said Order is printed, *infra* (Appendix B, p. A2). The Order of the United States District Court for the Eastern District of Pennsylvania, filed January 21, 1975, denying a motion for certification of its order of December 30, 1974, is unreported. Said Order is printed, *infra* (Appendix C, p. A4). The Order of the United States District Court for the Eastern District of Pennsylvania, filed December 30, 1974, denying plaintiff's motion to strike defendant's affirmative defense and denying defendant's motion for certification, is unreported. Said Order is printed, *infra* (Appendix D, p. A6). The Opinion of the United States District Court for the Eastern District of Pennsylvania, filed December 30, 1974, is unreported. Said Opinion is printed, *infra* (Appendix E, p. A8).

The Order of the United States District Court for the Eastern District of Pennsylvania, filed August 5, 1974, granting plaintiff's motion to strike defendant's credit defense is unreported. Said Order is printed, *infra* (Appendix F, p. A19).

The Opinion of the United States District Court for the Eastern District of Pennsylvania, entered August 5, 1974, is reported at 379 F. Supp. 759 and is printed, *infra* (Appendix G, p. A21).

The report of pre-trial conference and District Judge Luongo's orders are printed, *infra* (Appendix H, p. A50).

JURISDICTION.

By its Order entered April 30, 1975, *infra*, the United States Court of Appeals for the Third Circuit granted this respondent's motion to dismiss petitioner's appeal. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1).

QUESTIONS PRESENTED.

1. Was not the Trial Court's order dismissing the cause of action based upon the warranty of seaworthiness interlocutory?

2. Congress acted within its authority in enacting a statute which eliminates a warranty of seaworthiness as a basis for recovery for personal injuries to, or death of, a longshoreman injured in the course of his employment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The statutory provisions involved are 28 U. S. C. § 1291 and 33 U. S. C. § 905(b). Said provisions are printed, *infra* (Appendix A, p. A1).

The Constitutional provision involved is Article III, Section 2 (Appendix A, p. A1).

STATEMENT UNDER RULE 33(b)(2).

Since the proceeding draws into question the constitutionality of the Act of March 4, 1927, c. 509, § 5, 44 Stat. 1426, as amended October 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263, 33 U. S. C. § 905(b), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U. S. C. § 2403 may be applicable.

The United States District Court for the Eastern District of Pennsylvania has, on December 4, 1974, pursuant to 28 U. S. C. § 2403, certified to the Attorney General of the United States the fact that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE.

This case was brought in District Court for the Eastern District of Pennsylvania alleging a cause of action based upon negligence and unseaworthiness. Jurisdiction is premised on diversity of citizenship. 28 U. S. C. § 1332 (1970).

Plaintiff-petitioner brought suit against defendant-respondent for injuries sustained while working as a longshoreman. Petitioner based his cause upon 1) unseaworthiness; and 2) negligence.

Respondent, in a third-party complaint, sought a credit, indemnity or contribution against third-party defendant stevedoring company. A motion to strike this complaint was granted and respondent moved the District Court for certification and reconsideration. These motions were denied.

Respondent asserted as an affirmative defense that the cause of action for unseaworthiness was explicitly barred by 33 U. S. C. A. § 905(b). Petitioner's motion to strike that defense was denied by the trial court. Petitioner's motion to certify the order denying his motion to strike that defense was also denied. Petitioner appealed to the United States Court of Appeals for the Third Circuit, and respondent moved to dismiss, averring the District Court's order was interlocutory. This motion to dismiss was granted on April 30, 1975.

A pre-trial conference was held on July 29, 1975. District Judge Luongo ordered all discovery and pre-trial memoranda to be completed by August 29, 1975. An October trial date is anticipated.

ARGUMENT.

I. The Refusal to Strike the Respondent Shipowner's Defense Based Upon the 1972 Amendment Was an Interlocutory Order and Therefore Not Appealable.

1. The Courts below clearly considered the order of the District Court denying petitioner's motion to strike respondent's affirmative defense as not a "final order" as described in 28 U. S. C. § 1291.

28 U. S. C. § 1291 bestows upon the Court of Appeals jurisdiction of appeals "from all final decisions of the District Courts of the United States . . ." (Appendix A, *infra*, p. A1). Excluded from appellate review are those orders which are interlocutory in nature being entered as an integral part of the cause at trial, not collateral nor severable. "The rule . . . for determining whether, for purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties." *LaBourgogne*, 210 U. S. 95.

Because of the large number of similar cases in the Eastern District of Pennsylvania which would be affected, Chief Judge Joseph S. Lord, III, Judge Alfred L. Luongo and Judge Daniel H. Huyett, 3rd (not as a statutory three-Judge Court) convened to pass upon the motions to dismiss, motions to certify to the Court of Appeals and motion to strike a defense filed by petitioner and respondent. It is respectfully submitted that petitioner himself recognized the interlocutory nature of the order by moving the District Court to certify it under 28 U. S. C. § 1292(b) so as to bring it within the scope of appellate review. This the District Court declined to do, failing to find in its order a "controlling question of law as to which there is substantial ground for difference of opinion" 28 U. S. C. § 1292(b) (see opinion, Appendix E, p. A18).

In granting respondent's motion to dismiss the petitioner's appeal, the Court of Appeals for the Third Circuit, Van Dusen, Adams and Garth, Circuit Judges, obviously agreed with the District Court's opinion, for it summarily granted respondent's motion to dismiss, without opinion (See Order, Appendix B).

Thus the history of the case to date clearly shows that six federal judges have found the order complained of to be interlocutory and outside the scope of § 1291.

2. The purpose of limiting appeals to "final orders" is the avoidance of piecemeal litigation and undue delay in arriving at a determination on the merits.

Petitioner's reliance on the holding of this Court in *Gillespie v. U. S. Steel Corp.*, 379 U. S. 148 (1964) is misplaced. In *Gillespie*, the District Judge, holding that the Jones Act supplied the exclusive remedy for recovery in the death of the seaman, also barred any claim to recovery on the part of surviving siblings during the life of the mother. While acknowledging that the Order of the District Court presented an "obviously marginal case," *Gillespie, supra*, at 154, this Court was impressed with the lack of finality in the order delaying the rights of the siblings, and held that such delay outweighed the drawbacks of piecemeal review. "Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so far as the District Judge's ruling stands." *Ibid.* at 153. In the instant case, respondent respectfully submits that the order of the District Court denying petitioner's motion to strike respondent's affirmative defense in no way serves to frustrate or delay final determination of the rights and liabilities of the parties. Rather, such order serves to clarify the issues in dispute, and to promote the orderly progression of the cause. As the District Court

in its Opinion stated: "After the second long delay in the litigation occasioned by our preparing another memorandum resolving pre-trial motions, we believe the best hope for 'materially advancing the ultimate termination of the litigation' is to proceed with it in the District Court." (See Appendix E at page A18).

In fact, in this case, plaintiff may be materially hampered by further delay. The District Court has ordered all pre-trial memoranda to be filed by August 29th, with a trial date anticipated for October. Should the cause be heard on the merits, and should plaintiff-petitioner prevail, his arguments to this honorable Court would be moot. In any event, plaintiff-petitioner does not stand to be harmed by denial of the Writ at this time. Once the case has been heard and decided, the usual avenues of appeal remain open to him.

3. Finally, in *Gillespie*, this Court sustained the Court of Appeals' assumption of jurisdiction in a "marginal case", whereas in the instant case the Court of Appeals expressly *rejected* an assumption of jurisdiction, finding the Order not subject to appeal at this stage of the proceedings. Respondent contends that the judgment of the Court of Appeals should not be disturbed.

II. Elimination by Congress of the Warranty of Seaworthiness Was Clearly Within Its Constitutional Mandate to Legislate With Regard to Maritime Law and Admiralty Jurisdiction.

1. This Court has always recognized a wide latitude of legislative authority over maritime law. Here and in the district court, petitioner cites *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 44 S. Ct. 391 (1924) for the proposition that Article III, Section 2 of the Constitution prohibits Congress

from substantively amending the maritime law and admiralty jurisdiction "by excluding a thing falling clearly within them, or including a thing falling clearly without." *Panama, supra*, at p. 386.

In its Opinion (Appendix E, p. A8) of December 30, 1974, denying petitioner's motion to strike respondent's affirmative defense to the complaint of unseaworthiness, the District Court rejected the notion that this language severely circumscribes the power of Congress to legislate in the field of maritime law. In examining the holding in *Panama* in its entirety, the court below discussed the breadth of Congressional discretion. It quoted from this Court's decision in *Panama* to show that this Court recognized wide congressional discretion in dealing with problems of maritime law. Some of these problems came in the wake of a series of decisions by this Court. See *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952), *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956) and *Reed v. S. S. Yaka*, 373 U. S. 410 (1963) to name but a few. The District Court cited *Panama* as follows:

> "'After the Constitution went into effect, the substantive law theretofore enforced was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States, subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits the exercise of a wide discretion. (ibid. U. S. at 385-386).'"

(See Appendix E, p. A12).

The District Court goes on to say:

> "Immediately following this discussion, the Court does identify two constitutional limits on the legislative power. The first limit is the one invoked by the plaintiffs—'that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects' *ibid.* The second limit, and the one the Court has acted upon, restrains Congress from enacting legislation which undermines the uniformity of maritime law and thereby contravenes the constitutional policy upon which a federal maritime law is based . . . . Despite the use of the conjunctive 'maritime law and admiralty jurisdiction' in the excerpt on which plaintiffs rely, we conclude that the language of limitation under discussion placed boundaries on congressional power to expand and contract admiralty jurisdiction, not on its power to arrange and rearrange substantive maritime remedies." (footnote omitted) (See App. E, pp. A13 & 14).

With this interpretation by the District Court respondent is in full accord.

2. This Court will not restructure substantive maritime law by usurping the legislative function of Congress. In reaching its decision on the constitutional issue raised by plaintiff-petitioner below, the District Court was guided by this Court's holding in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 72 S. Ct. 277 (1952).

> "Finally, we note that the Supreme Court has explicitly recognized the peculiar appropriateness of the legislative process to striking the correct balance of maritime remedies. In *Halcyon Lines v. Haenn*

Ship Ceiling & Refitting Corp., [citation omitted] the Court held that since Congress had not approved a right of contribution between shipowners and shoreside contractors, the Court could not appropriately do so. In so holding the Court said:

> 'We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. 342 U. S. at 286'" See App. E, p. A15).

The Constitution by its grant of power in Article III Section 2 authorizes the United States to assume jurisdiction of matters maritime. It is clear however that the authority to modify the substantive terms of the law and its appropriate remedies rest squarely with the Congress. The abolition of the warranty of seaworthiness in the Longshoremen's and Harbor Workers' Compensation Act 33 U. S. C. § 905(b) is a valid exercise of that authority.

3. It has long been the practice of this Court to decline to rule on the constitutionality of a duly-enacted federal statute or part thereof, absent a compelling need to do so. This Court has held that a strong presumption *in favor* of constitutionality rides with federal legislation. To rule otherwise would tend to usurp the legislative function allocated to Congress.

At a future date the Court may decide to review the merits of the scheme laid out in 33 U. S. C. § 905(b). However, the facts in this case do not warrant such review at this time.

Rather than undertake to rule upon the constitutionality of an Act of Congress at this stage of the controversy, respondent respectfully suggests that this Court should permit the courts below to examine and rule upon its divers aspects. With a wealth of testimony developed on the records below, this Court will then be presented with a more fully-fleshed portrait of this Act, rather than the sketch presented it by petitioner at this time.

CONCLUSION.

Respondent submits that the Courts below were correct in considering the orders appealed to be interlocutory and not subject to appeal.

Respondent further contends that Congress acted within its scope of authority in eliminating the warranty of seaworthiness by the 1972 Amendments to 33 U. S. C. §§ 901 *et seq.*

Wherefore, Respondent prays that the Writ be denied by this Honorable Court.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
KRUSEN EVANS AND BYRNE,
Counsel for Respondent.

APPENDIX A.

CONSTITUTIONAL PROVISIONS AND STATUTES.

U. S. Constitution.

Article III.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U. S. C. A.

§ 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1223-4

April 18, 1975

ROBERT H. LUCAS,
Appellant in No. 75-1223

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.m.b.H. & Co., K.G.

v.

NORTHERN METAL COMPANY (3RD PTY. DEFT.)
"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.M.B.H. & Co., K.G., DEFENDANT-THIRD PARTY PLAINTIFF,
Appellant in No. 75-1224

(D. C. Civil No. 73-1120)

Present: VAN DUSEN, ADAMS and GARTH, *Circuit Judges.*

1. Motion by Cross-appellant, "Brinknes" Schiffahrts Ges. Franz Lange G.m.b.H. & Co., K.G., to dismiss appeal of appellant in No. 75-1223, Robert H. Lucas, *or,* in the alternative, to extend time for filing brief and the appendix until 40 days after the Court has acted on this motion, *and* further moves this Court for an Order dismissing all of the appeals in Nos. 75-1220, 75-1221, 75-1223

and 75-1224, and remanding the records to the District Court for further proceedings leading to a final judgment to be entered by the District Court,

2. Answer by appellant in No. 75-1223, Robert H. Lucas, to motion by Cross-appellant to dismiss appeal in No. 75-1223,

3. Answer by appellee, Northern Metal Company, to motion of Cross-appellant to dismiss appeals, stating supports motion to dismiss appeals in Nos. 75-1220, 75-1221, 75-1223 and 75-1224,

in the above listed for Monday, April 28, 1975.

Respectfully,

/s/ THOMAS F. QUINN
Clerk

enc.
fm

P.S. On April 15, 1975 the Clerk granted Stipulation of counsel that the decision in No. 75-1223 will be binding upon Nos. 75-1220 and 75-1221, D. C. Civil No. 73-2150.

The foregoing Motion is granted and the records are remanded to the district court.

By THE COURT,

/s/ VAN DUSEN
Judge

Dated: April 30, 1975

APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOT THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-1120

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE
G.M.B.H. & CO., K.G.

v.

NORTHERN METAL COMPANY

CIVIL ACTION NO. 73-2150

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL COMPANY

ORDER.

Now, January 21, 1975, upon consideration of plaintiff's motion in Civil Action No. 73-1120 for certification of the Order of December 30, 1974, under 28 U. S. C. § 1292(b) and the motions in Civil Action No. 73-1120 and No. 73-2150 of August 7, 1974, of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of August 5, 1974, and the motions for reconsideration in Civil Action No. 73-1120 and No. 73-2150 of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of the Court of August 5, 1974, the contentions of the parties and memoranda filed, IT IS ORDERED that:

1. Plaintiff's motion in Civil Action No. 73-1120 for certification of the Order of December 30, 1974, under 28 U. S. C. § 1292(b) is DENIED;

2. The motions in Civil Action No. 73-1120 and No. 73-2150 of August 7, 1974, of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of the Court of August 5, 1974 are DENIED; and

3. The motions for reconsideration in Civil Action No. 73-1120 and No. 73-2150 of defendants-third party plaintiffs for certification under 28 U. S. C. § 1292(b) of the Order of the Court of August 5, 1974, are DENIED.

/s/ JOSEPH S. LORD, III
Joseph S. Lord, III
Ch. J.

/s/ ALFRED L. LUONGO
Alfred L. Luongo
J.

/s/ DANIEL H. HUYETT, 3RD
Daniel H. Huyett, 3rd
J.

APPENDIX D.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-1120

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE
G.M.B.H. & CO. K.G.

v.

NORTHERN METAL CO.

CIVIL ACTION NO. 73-2150

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL CO.

ORDER.

Now, December 30, 1974, It Is Ordered:

In Civil Actions Nos. 73-1120 and 73-2150,

(a) the motion of plaintiffs to strike the defendants' affirmative defense denying liability under the warranty of seaworthiness is Denied.

(b) the motion of defendants for certification to the Third Circuit under 28 U. S. C. § 1292(b) is Denied.

/s/ Joseph S. Lord, III,
Joseph S. Lord, III,
Ch. J.

/s/ Alfred L. Luongo,
Alfred L. Luongo,
J.

/s/ Daniel H. Huyett, 3rd,
Daniel H. Huyett, 3rd,
J.

APPENDIX E.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-1120

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.M.B.H. & CO., K.G.

v.

NORTHERN METAL CO.

CIVIL ACTION NO. 73-2150

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL CO.

BEFORE: JOSEPH S. LORD, III, *Chief Judge*
ALFRED L. LUONGO, *Judge*
DANIEL H. HUYETT, 3RD, *Judge* *

* A panel of three District Court judges was convened by Chief Judge Lord to consider these cases because of the number of cases pending in the Eastern District of Pennsylvania which have issues identical to the issues raised in these cases. This procedure will provide for uniformity of treatment of the issues involved even though a single district judge is not actually bound by our ruling in these cases. *See Turner v. Transportation Maritima Mexicana* S. A., 44 F. R. D. 412, 414 n. 1 (E. D. Pa. 1968).

OPINION.

HUYETT, *J.* December 30, 1974

Before us is a series of motions [1] in two admiralty actions arising out of shipboard injuries to longshoremen. These motions test the constitutionality of 33 U. S. C. § 905(b),[2] one of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. amended (Supp. II 1972).

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1. In an earlier memorandum resolving another series of pretrial motions filed in these actions, *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G. m. B. H. & Co., K. G.*, 379 F. Supp. 759 (E. D. Pa. 1974), we held that § 905(b) of Title 33, as amended, precluded any actions for indemnity or contribution by shipowners against stevedores arising out of injuries to the stevedores' employees. For a discussion of the history of the different rights and remedies treated in the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. as amended (Supp. II 1972), *see Lucas I* at 761-65.

2. 33 U. S. C. § 905(b) as amended (Supp. II 1972) reads:

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair service to the vessel. *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.* The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter. (Emphasis added)

MOTION TO STRIKE.

By a motion to strike defendant shipowners' affirmative defense denying liability under the warranty of seaworthiness, plaintiffs question the power of Congress to eliminate through § 905(b) a longshoreman's right to recover under the warranty of seaworthiness conferred on him in *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946). We deny the motion to strike.

Plaintiffs argue that Congress exceeded its constitutional authority under Article III, section 2,[3] when it eliminated the warranty of seaworthiness as a basis upon which longshoremen can recover.[4] Their argument relies heavily on the following excerpt from a passage in *Panama Railway Co. v. Johnson*, 264 U. S. 375, 386 (1924):

> [T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without.

Plaintiffs point out that this language of limitation is echoed in subsequent Supreme Court cases.[5] Such limiting

3. Article III, section 2, reads in part:

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.

4. The Supreme Court first afforded seamen the right to recover under a warranty of seaworthiness in *The Osceola*, 189 U. S. 158 (1903). To recover under the warranty, however, the seaman had to establish that the shipowner had breached a duty of reasonable care and that his injury did not result from the negligence of the master or crew. In 1944, the Court transformed the liability arising from a breach of the warranty of seaworthiness into an absolute, non-delegable liability. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96 (1944). Then, two years later the Court granted longshoremen the right to recover under a warranty of seaworthiness. *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946).

5. In *Crowell v. Benson*, 285 U. S. 22 (1932), the Supreme Court upheld the constitutionality of the original Longshoremen's

language, plaintiffs contend, precludes Congress from eliminating this "most substantial and most important" admiralty remedy, the warranty of seaworthiness.[6]

Since plaintiffs rely so strongly on *Panama Railway Co. v. Johnson*, we start by examining the lengthy passage

5. (Cont'd.)
and Harbor Workers' Compensation Act of 1927, 33 U. S. C. § 901 et seq. (1970). The Court quoted the following language from Chief Justice Taney's opinion in *The Genesee Chief*, 53 U. S. (12 How.) 443, 459 (1851):

> But the extent of the power as well as the mode of proceeding in which [admiralty] jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language.

285 U. S. at 53. In *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21 (1934), the Court upheld the Ship Mortgage Act, 46 U. S. C. §§ 911-984 (1970) (§ 973 as amended (Supp. I 1971)), which conferred on federal admiralty courts jurisdiction over actions to enforce the lien of a "preferred" mortgage on a ship, the term "preferred" being defined by the Act. The Court concludes a paragraph in which it or[illegible]s the broad power of Congress to determine maritime law by [illegible]ding:

> But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction.

293 U. S. at 44.

6. Plaintiffs seem to suggest that the lineage and antiquity of the warranty of seaworthiness are so compelling that Congress cannot, constitutionally exclude it. At the risk of mentioning the obvious, we note that the Supreme Court did not feel compelled to grant even a limited right of recovery under the warranty of seaworthiness until 1903. *The Osceola*, 189 U. S. 158 (1903). The warranty did not apply to longshoremen, the only group to which it has been denied under § 905(b), until 1946. *Seas Shipping Co., Inc. v. Sieracki*, 328 U. S. 85 (1946). On a grander scale, plaintiffs suggest that there exists, and existed at the time of the adoption of the Constitution, a core of substantive maritime law, including the warranty of seaworthiness, with which Congress cannot tamper. This notion we reject. We adopt the Supreme Court's statement in *The Lottawana*, 88 U. S. (21 Wall.) 558, 572 (1875), that "it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country."

from *Panama* of which the language cited by plaintiffs comprises a sentence. The passage begins with a long section in which the Court acknowledges the necessarily broad discretion of Congress to legislate in the area of substantive maritime law.[7] In discussing the nature of Article III, section 2, the Court states

> Although containing no express grant of legislative power over the substantive law, the provision [Article III, section 2] was regarded from the beginning as implicitly investing such power in the United States. Commentators took this view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superceded or as being only the law of the several States, but as having become the law of the United States, . . . subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion.

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7. Although there is no conflict among the Supreme Court cases on the broad discretion of Congress to enact maritime law, there is some disagreement as to where in the Constitution this power is grounded. The Court in *The Lottawana*, 88 U. S. (21 Wall.) 558, 577 (1875), found the source of congressional power to be Article I, section 8, cl. 3, the commerce clause. In *Panama Railway Co. v. Johnson*, 264 U. S. 382, 387 (1924), and *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 42 (1934), the Court found the source to be Article I, section 8, cl. 18, the necessary and proper clause. Finally, in *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 39 (1943), the Court identified both the commerce clause and the necessary and proper clause as the source of congressional power.

264 U. S. at 386. Immediately following this discussion, the Court does identify two constitutional limits on the legislative power. The first limit is the one invoked by plaintiffs—"that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects." *Id.* The second limit, and one the Court has acted upon, restrains Congress from enacting legislation which undermines the uniformity of maritime law and thereby contravenes the constitutional policy upon which a federal maritime law is based.

This second limit on the national Congress, and in one case on the New York legislature, led the Court to strike down several legislative schemes in a line of cases just prior to *Panama Railway Co. v. Johnson.* In *Southern Pacific Co. v. Jensen,* 244 U. S. 205 (1917), *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149 (1920), and *Washington v. Dawson & Co.,* 264 U. S. 219 (1924), the Court declared unconstitutional under Article III, section 2, an attempt by the New York legislature and two attempts by the national Congress respectively to apply state workmen's compensation schemes to maritime injuries. The Court struck down these attempts because maritime law is constitutionally designated federal law and must be uniform wherever the Constitution reaches.

Plaintiffs do not suggest in their briefs that § 905(b) exceeds this second limit. They argue instead that denial to longshoremen of the warranty of seaworthiness exceeds the first limit, the one imposed by the inherent nature of the subject. With this theory we cannot agree. Despite

8. Although the *Panama* Court uses the phrase "maritime law and admiralty jurisdiction," we suspect the Court intended only to echo the constitutional phrase but inserted the word "law" for a nicer rhetorical balance. The Constitution refers only to "maritime and admiralty jurisdiction." We cannot attribute to the Court's use of the word "law" the significance which the plaintiffs urge.

the use of the conjunctive "maritime law and admiralty jurisdiction" in the excerpt on which plaintiffs rely, we conclude that the language of limitation under discussion places boundaries on congressional power to expand and contract admiralty jurisdiction, not on its power to arrange and rearrange substantive maritime remedies.[9] We base our conclusion on several considerations. As we have already suggested, the language from *Panama Railway Co. v. Johnson* that plaintiffs cite is but a short excerpt from a long passage the predominant theme of which is the broad range of congressional discretion to alter and amend maritime law. This pattern, limiting language sounding a minor theme in a case in which the major theme is the wide-ranging congressional power to enact maritime law, is repeated in *Crowell v. Benson*, 285 U. S. 22 (1932), and *Deroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21 (1934), two other cases upon which plaintiffs rely. Further, in *Panama Railway Co. v. Johnson* and *Crowell v. Benson*, the Court upheld the federal legislation under constitutional attack despite thoroughgoing congressional rearrangement of substantive maritime remedies. In *Panama Railway v. Johnson* the Court upheld the consti-

9. We do not imply here that congressional discretion to expand or contract admiralty jurisdiction is narrowly restricted. In a line of cases in the first decade of this century, *Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.*, 203 U. S. 316 (1908); *The Troy*, 208 U. S. 321 (1908); and *Martin v. West*, 222 U. S. 191 (1911), the Supreme Court refused recovery in admiralty when a ship or its gear caused damage to persons ashore or to shore-based property. In 1948 Congress passed the Admiralty Extension Act 1948, 46 U. S. C. § 740 (1970), which in effect overruled this line of cases conferring jurisdiction in admiralty for these kinds of accidents. Although the Supreme Court has never ruled directly on the constitutionality of the Act, the Court in *Victory Carriers, Inc. v. Law*, 404 U. S. 202, 209-210 (1971), recounts this legal history with apparent equinimity and reports that "[t]he [Admiralty Extension Act] survived constitutional attack in the lower federal courts and was applied without question by this Court in *Gutierrez*. . . ." (citations omitted).

tutionality of the Jones Act, 46 U. S. C. § 688, which conferred on seamen a negligence remedy governed by "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees." In *Crowell v. Benson* the Court upheld the original Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. § 901 et seq., which created a federal workmen's compensation scheme for longshoremen. In fact, except for legislation struck down for undermining the uniformity of maritime law, plaintiffs cannot cite us a single case in which a congressional enactment of substantive maritime law was declared unconstitutional.

Finally, we note that the Supreme Court has explicitly recognized the peculiar appropriateness of the legislative process to striking the correct balance of substantive maritime remedies. In *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282 (1952), the Court held that since Congress had not approved a right of contribution between shipowners and shoreside contractors, the Court could not appropriately do so. In so holding, the Court said:

> We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run.

342 U. S. at 286; accord *United States v. Atlantic Mutual Insurance Co.*, 343 U. S. 236, 242 (1952). Our first opinion in this matter, *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G.*, 379 F. Supp. 759, 767-69 and appendix (E. D. Pa. 1974), discusses at length the shifting of weights, as revealed by the legislative history, which finally struck the balance represented by the 1972 Amend-

ments to the Longshoremen's and Harbor Workers' Compensation Act. After full legislative hearings at which representatives of all interested groups testified, Congress adjusted the previous balance of remedies toward the goal of a more humane and more equitable scheme. As we found in *Lucas I*, 379 F. Supp. at 766-67, the 1972 Amendments reveal themselves as a configuration in which the stevedore is strictly liable to his employee for increased workmen's compensation benefits. The stevedore, in turn, is protected against action by shipowners for indemnity and contribution when a longshoreman is injured on the job through a shipowner's negligence. Finally, and this completes the configuration, the shipowner is no longer strictly liable to the longshoreman under the warranty of seaworthiness; only a simple, common-law negligence remedy remains available to the longshoreman against the shipowner. In light of our characterization of the 1972 Amendments, we note the recent case of *Burris v. Lavino Shipping Co.*, – F. 2d – (3d Cir. Oct. 30, 1974), Civil No. 74-1120, in which the Third Circuit, in dicta,[10] characterized the Amendments as:

> rationaliz[ing] the relative liabilities of shipowners and stevedores by replacing maritime concepts of liability with "a new cause of action for negligence in which a shipowner is not to be held liable as a third party unless the former's negligence was such as would render a land-based third party in non-maritime pursuits liable under similar circumstances" . . . .

(citation omitted).

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10. In *Burris* the Third Circuit found that the 1972 Amendments did not apply because the accident giving rise to the action in federal court occurred prior to the effective date of the Amendments. *Burris v. Lavino Shipping Co.*, – F. 2d –, – and note 9 (3d Cir. 1974).

To summarize, then, we hold that in denying to longshoremen the right to recover under the warranty of seaworthiness in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, Congress has exceeded its power neither under the Constitution nor under the constitutional interpretation found in *Panama Railway v. Johnson*. The caution sounded in *Panama* is against extreme congressional tampering with the boundaries of admiralty jurisdiction, either territorial or subject matter jurisdiction. We agree that Congress may not, constitutionally, bring under the jurisdiction of a federal admiralty court a completely land-based accident or transaction. Conversely, we concede that Congress cannot remove from admiralty jurisdiction those types of accidents which occur on navigable water since these are conceptually, traditionally, and constitutionally admiralty matters. This does not mean, however, that Congress may not amend or alter the substantive law of admiralty as long as it does not interfere with admiralty jurisdiction. Section 905(b) in no way encroaches upon the jurisdiction of the admiralty court; it merely defines rules of law to be applied. More specifically, the amendment provides that liability to a longshoreman may not be based upon the breach of the warranty of seaworthiness. It does not disturb the jurisdiction of a district court to entertain a suit by an injured longshoreman. Article III, section 2, does not reach the substantive law of admiralty but only the jurisdiction and the uniform application of its laws. Section 905(b) does nothing to either.

MOTION FOR CERTIFICATION.

Defendants-Third Party Plaintiffs move that we certify the constitutional question here decided to the Third Circuit. Section 1292(b) of Title 28 provides for such a

procedure but only when "there is substantial ground for difference of opinion and . . . an immediate appeal may materially advance the ultimate termination of the litigation." Since we find § 905(b) clearly constitutional, we necessarily find no "substantial ground for difference of opinion." Further, after this second long delay in the litigation occasioned by our preparing another memorandum resolving pretrial motions, we believe the best hope for "materially advanc[ing] the ultimate termination of the litigation" is to proceed with it in the district court.

CONDITIONAL MOTION FOR RECONSIDERATION.

Defendants-Third Party Plaintiffs move that in the event we find § 905(b) unconstitutional, we reconsider our decision in *Lucas I*. Obviously, we need not reconsider.

/s/ JOSEPH S. LORD, III,
Joseph S. Lord, III,
Ch. J.

/s/ ALFRED L. LUONGO,
Alfred L. Luongo,
J.

/s/ DANIEL H. HUYETT, 3RD,
Daniel H. Huyett, 3rd,
J.

APPENDIX F.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 73-1120.

ROBERT H. LUCAS

v.

"BRINKNESS" SCHIFFAHRTS GES. FRANZ LANGE
G.m.b.H & Co. K.G.

v.

NORTHERN METAL CO.

CIVIL ACTION No. 73-2150.

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL CO.

ORDER.

This 5th day of August, 1974 it is ORDERED

1. In Civil Action No. 73-1120,

(a) plaintiff's motion to strike defense that defendant is entitled to a 50% credit against any judgment obtained by plaintiff should defendant prove concurrent negligence on the part of plaintiff's employer in causing plaintiff's injuries is GRANTED;

(b) third-party defendant Northern Metal Co.'s motion to dismiss third-party plaintiff "Brinkness" Schiffahrts Ges. Franz Lange G.m.b.H. & Co. K.G.'s second amended third-party complaint is GRANTED.

2. In Civil Action No. 73-2150, third-party defendant Northern Metal Co.'s motion to dismiss third-party plaintiff Eternity Carriers, Inc.'s second amended third-party complaint is GRANTED.

/s/ JOSEPH S. LORD, III
Joseph S. Lord, III,
Ch. J.

/s/ ALFRED L. LUONGO
Alfred L. Luongo,
J.

/s/ DANIEL H. HUYETT, 3RD
Daniel H. Huyett, 3rd,
J.

APPENDIX G.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-1120.

ROBERT H. LUCAS

v.

"BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G.m.b.H. & CO., K.G.

v.

NORTHERN METAL CO.

CIVIL ACTION NO. 73-2150.

DENNIS A. FARRO

v.

ETERNITY CARRIERS, INC.

v.

NORTHERN METAL CO.

Before: JOSEPH S. LORD, III, *Ch. J.*
ALFRED L. LUONGO, *J.*
DANIEL H. HUYETT, 3RD, *J.*[*]

[*] A panel of three District Court judges was convened by Chief Judge Lord to consider these cases because of the number of cases pending in the Eastern District of Pennsylvania which have issues identical to the issues raised in these cases. This procedure will provide for uniformity of treatment of the issues involved even though a single district judge is not actually bound by our ruling in these cases. *See Turner v. Transportation Maritima Mexicana S. A.*, 44 F. R. D. 412, 414 n. 1 (E. D. Pa. 1968).

OPINION.

By HUYETT, *J.* August 5, 1974

Congress in 1972 gave careful consideration to the compensation scheme provided by the Longshoremen's and Harbor Workers' Act of 1927, 33 U. S. C. §§ 901 *et seq.* (1970). Among the matters extensively treated in the 1972 Amendments to the Act, 33 U. S. C. §§ 901 *et seq. as amended* (Supp. II 1972), was the question whether third-party suits should be allowed by the longshoreman against the vessel which caused the longshoreman to be injured. Congress did provide for such suits when the vessel's negligence caused the injuries. 33 U. S. C. § 905(b) (Supp. II 1972). The cases before us present the question whether any recovery obtained by the longshoreman as a result of the vessel's negligence should either be diminished or be allowed against the longshoreman's employer—the stevedore—when its negligence is a concurrent cause of the injuries.

In each case a longshoreman seeks to recover damages against the defendant vessel owner as a result of injuries caused while working on the vessel.[1] The basis for recovery is alleged to be that the vessel owner was negligent. The vessel owners have filed third-party complaints against the longshoremen's employers alleging that the third-party defendant stevedores were negligent in causing injury to plaintiffs and failed in their contractual duty to perform their services in a competent and workmanlike manner causing injury to plaintiffs. In the alternative it is alleged that if the acts or omissions of the third-party defendants contributed to plaintiffs' injuries, the vessel owners are en-

1. Jurisdiction is premised on diversity of citizenship. 28 U. S. C. § 1332 (1970).

titled to a credit or reduction of 50% of any damages awarded to plaintiffs.[2]

The second amended third-party complaints seek (1) full or partial indemnity from third-party defendants for some or all of the damages which may be awarded to the plaintiffs in the proceedings, as well as all legal fees, costs and expenses incurred and expended by defendants and third-party plaintiffs, (2) a credit or reduction of 50% of any and all damages adjudged and awarded to the plaintiffs in these proceedings, (3) contribution from third-party defendants for a proportionate share of any amount of damages adjudged and awarded to plaintiffs in these proceedings, or (4) contribution or indemnity from third-party defendants to the extent of all medical expenses and compensation paid or payable pursuant to third-party defendants' legal liability therefor under the terms and provisions of the Harbor Workers' Act, said amount to be applied as a credit or set off against whatever damages are awarded to plaintiffs in these proceedings.

The third-party defendant stevedores have moved to dismiss the second amended third-party complaints for failure to state claims upon which relief can be granted. And the plaintiff in LUCAS has moved to strike the vessel's answer setting forth a 50% credit as a defense if the stevedore's negligence also caused plaintiff's injuries. We will grant these motions.

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2. The proposition that third-party plaintiffs are entitled to a credit against any recovery obtained by the plaintiffs is also raised in the answer to the complaints. In *Lucas* the plaintiff has moved to strike this defense.

DEVELOPMENT OF THE THIRD-PARTY SUIT[3]

Longshoremen's remedies historically have been subject to the crosswinds sweeping o'er land and sea. Although employed by the land-based stevedore, the longshoreman typically performs his services on the vessel while it is in navigable waters. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52 (1914), held that admiralty has jurisdiction over a suit by a longshoreman against his employer for injuries occurring on the vessel while it is in navigable waters. With respect to the maritime nature of the longshoreman's work the Court stated: "Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as the mariners.'" *Atlantic Transport Co. v. Imbrovek*, 234 U. S. *supra* at 62. The theme that work performed on the vessel afforded longshoremen the benefit of admiralty remedies has been the source of much of the conflict Congress sought to resolve in the 1972 Amendments to the Harbor Workers' Act.

A. *Enactment of a Workmen's Compensation Scheme.*

Tension between the two great bodies of law governing affairs of the sea and of the land began when the Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917), asserted that a state compensation scheme providing benefits for a longshoreman injured on navigable waters was incompatible with the need for uniformity in maritime law.

3. *See generally* Note, *Maritime Jurisdiction and Longshoremen's Remedies*, 1973 Wash. Univ. L. Q. 649; F. Tetreault, *Seamen, Seaworthiness, And The Rights of Harbor Workers*, 39 Cornell L. Q. 381 (1954); G. Gilmore and C. Black, *Admiralty*, 248-394 (1957).

In rapid succession the Court struck down two further attempts by Congress to bring longshoremen within the ambit of state compensation acts. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920), held unconstitutional an amendment to the "saving to suitors clause" [4] allowing application of state compensation laws to injuries occurring on the vessel. *Washington v. Dawson & Co.*, 264 U. S. 219 (1924), invalidated a statutory amendment similar to that involved in *Stewart*.

True to its reasoning in *Imbrovek* the Court then held that longshoremen were seamen within the meaning of the Jones Act, 46 U. S. C. § 688, and could, therefore, recover under that Act against the stevedore-employer for the latter's negligence. *International Stevedoring Company v. Haverty*, 272 U. S. 50 (1926). The Jones Act provided the longshoreman with an attractive negligence remedy against his employer. The Jones Act plaintiff was not subject to the assumption of risk or contributory negligence defenses. This situation was altered, however, when Congress enacted the Harbor Worker's Act making the longshoreman's remedy under the Act the exclusive method of relief against the employer.[5] *See Swanson v. Marra Brothers, Inc.*, 328 U. S. 1 (1946) (holding that the Harbor Workers' Act provided the exclusive remedy by the longshoreman against his employer and that he could not sue under the Jones Act).

Liability of the employer under the Act likewise was to be "exclusive and in place of all other liability of such

4. Codified at 28 U. S. C. § 1333 (1970).

5. A twilight zone of coverage by state compensation acts was allowed in certain circumstances. 33 U. S. C. § 903(a) (1970); Rodes, *Workmen's Compensation for Maritime Employers: Obscurity in the Twilight Zone*, 68 Harv. L. Rev. 637 (1955). Section 2(c) of the 1972 Amendments eliminates this twilight zone. 33 U. S. C. § 903(a) (1972 Supp. II).

employer to his employee, his legal representative, husband or wife, parents, defendants, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *." § 5, 44 Stat. 1426, *as amended*, 33 U. S. C. § 905 (1970). The Act permitted the longshoreman, however, to bring an action against any third party who may have caused the injuries. § 33, 44 Stat. 1440, *as amended*, 33 U. S. C. § 933 (1970). The admiralty remedy of unseaworthiness became the predominant relief sought in these third-party actions.

B. *The Doctrine of Unseaworthiness.*

Historically, the vessel's duty to provide a seaworthy ship was available only to the seaman and then only in limited circumstances. The seaman could not recover for the operating negligence of the master in giving an order which caused the seaman injury. *The Osceola*, 189 U. S. 158 (1903).[6] Furthermore, "[t]he shipowner's liability in American Courts, as in the English, was limited to cases in which he had failed to use reasonable care to provide proper appliances, and liability did not attach where mariners' injuries resulted from the failure of those aboard the vessel to make proper use of such appliances." F. Tetreault, *Seamen, Seaworthiness, and the Right of Harbor Workers*, 39 Cornell L. Q. 381, 392 (1954) (footnote omitted).

Later cases, however, have established the doctrine of seaworthiness of the vessel as an absolute non-delegable duty without regard to negligence owed to the seaman, the longshoreman and other harbor workers injured on the

6. The Jones Act, 46 U. S. C. § 688, later provided a remedy for this kind of negligence.

vessel. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96 (1944), established the warranty of seaworthiness to be absolute. Harking back to the maritime nature of the longshoremen's work articulated in *Imbrovek, supra,* the Court in *Seas Shipping Co., Inc. v. Sieracki,* 328 U. S. 85 (1946), held that the warranty of seaworthiness was available to the longshoreman. *Pope & Talbot, Inc. v. Hawn,* 346 U. S. 406 (1953), extended the warranty of seaworthiness to other harbor workers injured on the vessel. The warranty was also available to the harbor worker even though he was directly employed by the vessel. *Reed v. Yaka,* 373 U. S. 410 (1963).

The scope of the liability imposed on the vessel by the doctrine of seaworthiness was broad. As stated by one commentator:

> "Since *Mahnich,* courts have found liability under the warranty of seaworthiness for such conditions as defects in cargo containers,[33] improper stowage of cargo,[34] the presence of extraordinary hostile or aggressive seamen,[35] the requiring of two men to do the work of four,[36] faulty ship's structure [37] and equip-

"33. Gutierrez v. Waterman S. S. Corp., 373 U. S. 206 (1963); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U. S. 355 (1962).

"34. Gindville v. American-Hawaiian S. S. Co., 224 F. 2d 746 (3d Cir. 1955); Amador v. A/S J. Ludwig Mowinckels Rederi, 224 F. 2d 437 (2d Cir.), *cert. denied,* 350 U. S. 901 (1955); Palazzolo v. Pan-Atlantic S. S. Corp., 211 F. 2d 277 (2d Cir. 1954), *aff'd sub nom.* Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124 (1956).

"35. Boudoin v. Lykes Bros. S. S. Co., 348 U. S. 336 (1955).

"36. Waldron v. Moore-McCormack Lines, Inc., 386 U. S. 724 (1967).

"37. Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423 (1959).

ment,[38] defective equipment brought aboard by the stevedore,[39] and incompetent personnel.[40]

"38. Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946).

"39. Alaska S. S. Co. v. Petterson, 347 U. S. 396 (1954), *aff'g per curiam* 205 F. 2d 478 (9th Cir. 1953). The Ninth Circuit had 'assumed' that the equipment causing the longshoreman's injury had been brought aboard by the stevedore contractor, had said that no proof existed that the equipment was defective, had conceded that the stevedore had control of the ship at the time of the injury, and then had held that the shipowner's duty is 'one he cannot delegate.' 205 F. 2d at 480.

"40. Keen v. Overseas Tankship Corp., 194 F. 2d 515 (2d Cir. 1952)."

Maritime Jurisdiction and Longshoremen's Remedies, 1973 Wash. U. L. Q. 649, 655. In addition, the vessel has been held liable when the primary cause of the longshoreman's injury was brought into play by his fellow workers. *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423 (1959); *Albanese v. Matts*, 382 U. S. 283 (1965); *Blassingill v. Watermann S. S. Corp.*, 336 F. 2d 367 (9th Cir. 1964).

C. *Indemnity Action Between Shipowner and Stevedore.*

The liability imposed on the vessel by the warranty of seaworthiness soon washed ashore engulfing the land-based stevedore in indemnity actions whenever the stevedore's actions caused the unseaworthy condition. *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Co.*, 350 U. S. 124 (1956), held that an action by the vessel against the stevedore based on an implied contract to perform his duties in a workmanlike manner was not barred by the exclusivity provision of section 5 of the Harbor Workers' Act. 33 U.S.C. § 905 (1970).

In regard to the exclusivity provision the Court reasoned that section 5 evidenced a trade-off between the employer and the employee. The employee obtaind compensation regardless of fault and the employer was free from any other liability to the employee. "On the other hand, the Act prescribes no quid pro quo for a shipowner that is compelled to pay a judgment obtained against it for the full amount of a longshoreman's damages." 350 U. S. *supra* at 129 (footnote omitted). Furthermore, "the Act nowhere expressly excludes or limits a shipowner's right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractor's own agreement to save the shipowner harmless." 350 U. S. *supra* at 130. The Act, therefore, did not preclude relief against the stevedore.

The *Sieracki-Ryan* line of cases thus resulted in the stevedore often being held liable to his employee far beyond his compensation obligations under the Act.

Right to Contribution in Admiralty [7]

The *Ryan* court was precluded by *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952), from holding that the vessel had a right of contribution against the stevedore when the stevedore was also a cause of the longshoreman's injury. *Halcyon* refused to permit contribution against the stevedore even though there was a jury determination that the stevedore was 75% responsible for the longshoreman's injuries. While raising doubts about the existence of the right to contribution in a non-collision admiralty case, the Court based its refusal to provide for contribution upon the inappropriateness of

7. *See generally* G. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Cal. L. Rev. 304 (1957).

the judiciary in fashioning rules of contribution. The Court felt the matter should be left to Congress.

Recently, in *Cooper Stevedoring Co. Inc. v. Kopke*, — U. S. — (1974), the Court resolved any doubt about the existence of a right to contribution among joint tortfeasors in a non-collision admiralty action.[8] The Court stated:

> "Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate that where two parties 'are both in fault, they should bear the damage equally, to make them more careful.' *The Alabama, supra*, 92 U. S. at 697. And a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris, supra*, 137 U. S., at 14."

Cooper Stevedoring Co. v. Kopke, — U. S. — (slip opinion p. 5).

With respect to the specific issued raised in *Halcyon*, the *Cooper* court agreed with lower federal courts that *Halcyon* provided only an immunity for the employer from tort liability by statute. *See In Re Seaboard Shipping Corp.*, 449 F. 2d 132 (2d Cir. 1971), *cert. denied* 406 U. S. 949 (1972); *Watz v. Zapata Off-Shore Corp.*, 431 F. 2d 100 (5th Cir. 1970); *Horton & Horton, Inc. v. T. S. J. E. Dyer*, 428 F. 2d 1131 (5th Cir. 1970), cert. denied, 400 U. S. 993 (1971). Referring to *Halcyon* the Court stated:

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8. *Cooper* was a pre-1972 Amendment case and thus did not consider the issue before us.

> "Before this Court, both parties in *Halcyon* agreed that 'limiting an employer's liability for contribution to those uncertain amounts recoverable under the Harbor Workers' Act is impractical and undesirable.' 342 U. S., at 284. The Court also took cognizance of the apparent tradeoff in the Act between the employer's limitation of liability and the abrogation, in favor of the employee, of common-law doctrines of contributory negligence and assumption of risk. *Id.*, at 285-286. Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case."

Cooper Stevedoring Co., Inc. v. Kopke, — U. S. *supra* at — (slip opinion pp. 6-7). It is therefore clear that, absent considerations imposed by statutes such as the Harbor Workers' Act, admiralty courts are relatively free to fashion appropriate rules of contribution based on fairness to the parties.

A rule of contribution never applied in an admiralty case finds support in cases from the District of Columbia Circuit Court of Appeals. *Murray v. United States*, 405 F. 2d 1361 (D. C. Cir. 1968), held that the lessor of a building leased to the United States was entitled to a *pro rata* credit on any liability obtained against it by a government employee if the government's negligence also caused the employee to be injured. The government enjoyed immunity from tort liability to its employees as a result of the exclusivity provision of the Federal Employees Compensation Act, 5 U. S. C. § 8116(c) (1970).

The *Murray* court found support for such a credit in cases involving the effect of a release by the plaintiff of a joint tortfeasor. *See Martello v. Hawley*, 112 U. S. App. D. C. 129, 300 F. 2d 721 (D. C. Cir. 1962); *McKenna v. Austin*, 134 F. 2d 659 (D. C. Cir. 1943). No analysis was made by the *Murray* court of the different considerations involved in a statutorily created immunity from those involved in a contractual settlement of liability.

Dawson v. Contractors Transport Corp., 467 F. 2d 727 (D. C. Cir. 1972), affirmed the propriety of the *Murray* credit and noted the doctrine's basis in equity. Significantly, the *Dawson* court dealt with a private District of Columbia employer who enjoyed the benefit of the exclusivity provision of the Harbor Workers' Act.[9]

The 1972 Amendments to the Longshoremen's and Harbor Workers' Act of 1927.

The 1972 Amendments to the Act dealt with four considerations: (1) the level of benefits provided, (2) the extension of the Act's coverage to additional workers, (3) the provision for third-party suits against persons other than the employer, and (4) administrative matters. Increasing benefits under the Act was closely tied to a resolution of the issue whether third-party suits resulting in liability to the stevedore beyond that provided in the Act should be allowed.

The cause of this increased liability of the stevedore to his employee was primarily attributed to the expansive scope given the doctrine of seaworthiness in *Mahnich*, the application of the doctrine to persons covered by the Harbor Workers' Act in *Sieracki* with the resultant liability

9. 36 D. C. Code § 501 makes applicable to the District of Columbia the Harbor Workers' Act.

imposed on the stevedore by *Ryan*. The Committee Reports reflect the concern for this increased liability. The Senate Report states:

> "While everyone has agreed since at least the mid-1960's that the benefits under this Act should be raised, there has been some dispute over the years as to whether such benefits should be raised so long as this compensation law was not the exclusive remedy for an injured worker. It has been the feeling of most employers that while they were willing to guarantee payment to an injured worker regardless of fault, they would only do so if the right to such payment was the exclusive remedy and they would not be subject to additional law suits because of that injury."

S. Rep. No. 92-1125, 92d Cong. 2d Sess., 4-5 (1972). *See also* H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., 4-8 (1972).

There can be no doubt that Congress achieved its purpose of eliminating increased liability to the employer due to the seaworthiness doctrine. Congress amended the exclusivity section of the Act by adding subsection 5(b), 33 U. S. C. § 905(b), which provides as follows:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title *and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.* If such person was employed by the vessel to provide stevedoring

> services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. *The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.* The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.[10] (Emphasis added.)

The amendment eliminates suits against the vessel based on the doctrine of seaworthiness by persons covered under the Act. In addition, agreements to indemnify or hold harmless the vessel are expressly prohibited. Furthermore, the *Yaka* case, allowing suit by the longshoreman when directly employed by the vessel, is overruled by providing that the vessel in that circumstance is entitled to the same exclusive liability as the stevedore is to his employees.

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10. Subsection 5(a), 33 U. S. C. § 905(a), provides as follows:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee."

Essentially Congress rejected the courts' rationale that the longshoreman's tasks were subject to similar conditions and hazards as those of seamen. The House Report states:

> "* * * [T]he Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port."

H. R. Rep. No. 92-1441, 92d Cong., 2d Sess. 6 (1972).

Congress did, however, provide for suit by the longshoreman against the vessel for injuries caused by the vessel's negligence. The third-party plaintiff vessel owners argue that upon a showing of concurrent negligence by the stevedore causing injury to the longshoreman, they are entitled to a *Murray* credit or a *pro tanto* release of iability to the extent of any payments made by the stevedore to the longshoreman under the Act. Under the latter theory liability would be measured not by injury to the longshoreman but only by the amount of compensation paid by the stevedore. In addition, they claim a right to recover counsel fees and expenses upon a showing that the stevedore's negligence was the sole cause of the injuries to the longshoreman. The *amicus curiae* brief argues that the vessel can be liable only if it was the sole cause of the longshoreman's injuries or, in the alternative, the vessel can only be liable to the proportionate extent it caused the longshoreman's injuries. Under the latter theory the long-

shoreman's recovery would first be reduced by the longshoreman's own negligence and then by the extent to which the stevedore's negligence caused the injuries.

As is evident from these arguments, there are numerous solutions possible in determining how to spread liability among joint tortfeasors with each solution having the common denominator, so it is contended, of fairness.[11] Regardless of what our feelings may be, however, we are bound in the cases before us by Congress' policy determination.

Although Congress' attention was primarily focused on eliminating the liability thrust upon the stevedore by the *Mahnich-Sieracki-Ryan* line of cases, it appears clear to us that this concern was merely part of a larger effort to insulate the longshoreman's and harbor worker's employer from any liability other than that provided by the Act. Third-party suits were considered disruptive of the compensation scheme provided by the Act. Congress was concerned with the cost involved in allowing third-party suits. The expense to the stevedore involved in defending these suits was seen as a drain on the funds available for compensation under the Act.

It was understood by the members of Congress most directly involved in amending the Act that in allowing for any third-party suits Congress ran the risk that liability would eventually be visited on the employer. It was deemed essential that clear amending language be used to prevent such an occurrence. The process by which a consensus was reached to allow for a third-party suit against the vessel for its negligence illustrates Congress' paramount concern that the employer's liability under the Act to his

11. It is clear from the Committee Hearings that Congress was aware of the possibility of such a *pro tanto* shifting of liability. *See* H. R. Hearings, Statement of David Kaplan, Esq. and comments by John R. Martzell, Esq. at pp. 152-53.

employee must be insulated and was intended to be insulated by the emphatic language of amended subsection 5(b), 33 U. S. C. § 905(b).

In addition to the bills introduced in each house of Congress designed to increase compensation benefits and for other purposes, H. R. 3505 and S. 525 sought specifically to deal with third-party suits. Both these bills had the support of the shipowner and stevedore industry. Both proposed to eliminate completely third-party suits against the vessel. They would accomplish this result by defining the vessel as the longshoreman's employer even though the longshoreman may not have been directly employed by the vessel when injured. Labor interests, while desirous of effecting a raise in compensation benefits, were opposed to a complete elimination of third-party suits.

Allowance of a suit for negligence was seen as a practical compromise which would lessen the industry's opposition to increased benefits and still provide some remedy against the vessel when it was at fault in causing the longshoreman's injuries. In providing for the third-party suit against the vessel for its negligence, Congress perceived that it was eliminating the large number of cases in which the vessel was held liable without fault pursuant to the doctrine of seaworthiness. This perception was based on the assumption that the negligence remedy provided would be similar to the common law concept based on fault and not any maritime negligence concept in which the vessel owed some special duty to provide the longshoreman a safe place to work. Narrowing the scope of the vessel's duty with regard to safety to that of a common law fault duty was designed to eliminate as much as possible the unfairness to the vessel caused by the seaworthiness doctrine while still providing some remedy for the vessel's actions in causing the longshoreman to be injured. At the same time,

however, Congress expressed its concern that the stevedore employer would not be held liable for any damages caused by the vessel owner's negligence.

This overriding concern to insulate the employer was clearly presented in both the House and Senate hearings held on the various bills introduced. The testimony given by Francis A. Scanlan, Esquire in both houses of Congress presented most sharply the limits of the compromise solution allowing for a common law negligence suit against the vessel with insulation from liability to the employer-stevedore. Mr. Scanlan testified in favor of the bills eliminating the third-party actions. But in response to subcommittee members' questions concerning a common law negligence suit against the vessel, he indicated approval of such an approach so long as the liability was based on the vessel's fault and the stevedore would be insulated from liability. There appeared to be a consensus among the subcommittee members to such an approach.

The discussions in the Senate hearings illustrate Congress' objective of narrowing the liability of the shipowner to situations involving fault while insulating the stevedore from liability. Senator Eagleton, the Chairman of the Subcommittee on Labor of the Committee on Labor and Public Welfare, questioned Mr. Scanlan about the nature of the maritime liability owed by the shipowner. Mr. Scanlan pointed out that the seaworthiness doctrine imposed absolute liability on the vessel and that maritime negligence also imposed broad duties on the vessel unlike the relatively narrow duty imposed by common law negligence. Minority counsel, Mr. Mittelman, questioned whether the elimination of the seaworthiness doctrine would end the absolute duty imposed on the vessel. Mr. Scanlan thought such action would eliminate absolute liability but that the maritime negligence duty would still

be broad and might by case law development approach an absolute duty. It was then suggested by Senator Eagleton and Mr. Mittelman that the concern over maritime negligence could be alleviated if Congress expressed its intention that the vessel's duty would be analogous to a common law negligence duty and that a provision prohibiting indemnity agreements would insure that the liability imposed on the vessel by a common law negligence duty would not be shifted to the stevedore. All agreed that this result should and could be obtained. *See* Senate Hearings, Subcommittee on Labor of the Committee on Labor and Public Welfare, 92nd Cong., 2d Sess. at 270-74 (1972) (see Appendix to this opinion). A similar discussion appears in the House Committee Hearings. *See* H. R. Hearings, Select Subcommittee on Labor of the Committee on Education and Labor, 92nd Cong., 2d Sess. at 117-21 (1972).

More important, however, the language of amended subsection 5(b) tracks such a consensus understanding. The subsection explicitly eliminates the seaworthiness remedy. If Congress had intended only to overrule *Sieracki* and *Ryan* and to eliminate the stevedore's liability for unseaworthiness, it could have done so simply by eliminating seaworthiness claims against the vessel. But Congress did more. It specifically provided that the employer could not be held liable to the vessel by means of indemnity or hold harmless agreements. These prohibitions could only relate to attempts by the vessel to shift its negligence liability to the employer, for it is only for negligence that the vessel can be held liable. Furthermore, it would be anomalous for a court to provide that the stevedore must bear all or part of the vessel's liability when, under the statute, the parties cannot, by agreement, shift the liability. We think it clear, therefore, that Congress in-

tended to insulate the employer from any liability, including costs and counsel fees, to the vessel for the vessel's negligence.

We cannot at this time fashion the outlines of the negligence remedy Congress allowed to be brought against the vessel. This can only be left to future case development. It is clear, however, that Congress decided that the primary duty to provide a safe place to work is on the stevedore. The substantial increase in compensation benefits provided by the amendments was thought to be an incentive to the stevedore to provide a safe place to work. As stated in the Senate Report:

> "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.
>
> "This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement."

Senate Report No. 92-1125, 92d Cong., 2d Sess., 2 (1972). Courts should recognize that this duty falls primarily on the stevedore and not on the vessel owner. At the same time, however, Congress was concerned that the vessel owner not become lax in doing what it should reasonably be required to do to prevent injuries to the longshoremen. The common law negligence remedy was thought sufficient to provide the vessel with the necessary incentive. The argument by the *amicus curiae* that the shipowner can be liable only when it is solely negligent would negate Congress' intention to prevent shipowner negligence and is contrary to the terms of the Act. The Act clearly provides for such a suit regardless of the concurrent negligence by the stevedore. If Congress intended that the vessel could be liable only when its negligence was the sole cause of the injuries, the mere insertion of the word "solely" in the first sentence of subsection 5(b), 33 U. S. C. § 905(b), would have accomplished the result.

While leaving to future development the nature of the negligence action against the vessel, we consider it clear that with respect to the stevedore the sole liability was that provided under the Act. Congress sought to eliminate all actions against the stevedore whether for indemnity or contribution, whether based on tort or on contract, and whether for fees and expenses. Allowance of any such actions, even a *pro tanto* recovery to the extent of payments made by the employer under the Act, would create the circuitous type action Congress considered was too costly and disruptive of the compensation scheme to be permitted.

This result may leave the shipowner in an unenviable position. Certainly he is apprehensive about future case development which may lead to an expansive interpretation of the negligence action provided under the Act. If that result obtains, Congress would undoubtedly be called upon

to act. In the meantime, however, our feelings of fairness to the shipowner cannot override Congress' intention. With respect to the negligence action against the vessel, courts have been thrust back to the situation existing before the expansive development of the seaworthiness doctrine. That situation was posed by one commentator as follows:

> "The seemingly limitless controversy and complexity that attends personal injury litigation between harbor workers and shipowners is attributable in part to a difficulty in resolving the respective scopes of the shipowner's obligation in connection with the condition of the vessel to the longshoreman as a 'business invitee', and the obligation of the independent stevedore contractor as employer of the longshoreman to exercise due diligence to furnish his employee a 'safe place to work'."

Tetreault, 39 Cornell L. Q. *supra* at 409. Courts must now work to resolve this difficulty.

The various methods proposed by the vessel owners to shift their tort liability would cause a disruption in the scheme provided by Congress. To this extent the wisdom of the *Halcyon* case endures. It is for Congress to provide the proper balance. Courts' sense of fairness can only prove disruptive of that balance.

DANIEL H. HUYETT, 3RD,
J.

APPENDIX TO OPINION.

SENATE HEARINGS, SUBCOMMITTEE ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS. AT 270-74 (1972).

Senator EAGLETON. Is there any other field—any employer-employee law with respect to a third-party situation where there is absolute liability imposed?

Mr. SCANLAN. Not to my knowledge, Mr. Chairman.

Senator EAGLETON. In the standard workmen's compensation situation, say in manufacturing plants that are assembling things, and the worker gets his hand cut in a mechanical device——

Mr. SCANLAN. A wheel or something like that?

Senator EAGLETON. A wheel; yes.

And he loses a finger or a hand. He has certain workmen's compensation rights that are afforded to him under State law, and if there was a third-party intervention in the situation say, in the manufacturing of the device by the X manufacturing company, he could bring, in essence, a product liability claim for negligence against that third-party; is that the standard sort of hornbook law?

Mr. SCANLAN. Yes; that is, Mr. Chairman.

Senator EAGLETON. Your objection is to the absolute liability?

Mr. SCANLAN. We are objecting to that, Mr. Chairman, because it is absolute liability, and also because the courts have construed negligence—maritime negligence in such a way that it is almost impossible to distinguish the case that you have given to me, which is a classic case of common law, negligence, as compared with maritime negligence—the duty to provide a safe place to work, as a form of negligence.

But it is also a form of absolute liability. And this is separate and apart from the question of the unseaworthiness of the gear, the appurtenances and equipment. This is what makes this particular problem so unique and so novel. And this is the reason why, Mr. Chairman, we feel that the cases should be eliminated as set forth in the bill, S. 525. This would then cure the situation of the unseaworthiness and the negligence and it would give the longshoremen the right to bring in true third-party cases against any party who is not a party to the employment relationship.

For example, in the case you have just cited, Mr. Chairman, under our proposal and the proposals set forth in S. 525, if the longshoremen wanted to sue the manufacturer of a piece of equipment, as you have just stated, a winch, for example, or any part of the equipment on board the vessel, that manufacturer could be sued the same as in a typical compensation case. What we feel should be done is that this particular field of the law should be restored to the regular compensation aspects and these cases that have distorted the law should be eliminated.

* * *

I don't have the time now, but the real economic impact on the entire industry, the idea of eliminating these cases as I have just stated to you, to restore this act to a true compensation act, and I say to you, Mr. Chairman, in conclusion, that our committee is convinced that for the welfare of the entire maritime industry it is necessary to eliminate these cases.

We agree with the statement that was made by Secretary of Labor Hodgson, which I have referred to on the top of page 17 of my statement; we feel that if these cases are eliminated and this act is restored as a true compensation act, then there definitely should be an improvement in the benefits. . . .

However, if there isn't to be any elimination of the third-party liability, and if we are to be exposed to the cost that we are exposed to now, and then additional costs that are now evaluated for the proposed benefits, we could not agree to that because that would really be catastrophic as far as this industry is concerned.

Mr. MITTELMAN. [minority counsel] * * * * Do you know whether it is a common practice in the Port of Philadelphia and other ports for stevedores to include in their contracts, to include in their contracts with shipowners, a hold harmless clause under which the stevedore agrees to hold the shipowner harmless even from the results of the shipowner's own negligence if it causes an injury to one of the stevedore's employees?

Mr. SCANLAN. Mr. Mittelman, I think there are some cases where that has happened, and it all depends on the contract and the contractual relationship between the parties, the shipowner, and the stevedore.

That's the typical hold harmless agreement.

I would say that there are some of those. I don't know how many. I know of one particular case that I had myself. They exist in other ports as well. I could not tell you, Mr. Mittelman, what the percentage is overall.

My own opinion is, based on cases that I have handled, that these are not too common, although they do exist.

Mr. MITTELMAN. If we wrote into this a prohibition, a hold harmless clause to the extent that they hold a shipowner harmless for injuries due to the shipowner's own negligence, plus a provision which authorized third-party actions only where there was negligence on the part of the shipowner as a third party, wouldn't that protect the stevedore from the circular liability that he now develops?

Mr. SCANLAN. Yes; that would give him a good deal of protection. It wouldn't be complete protection, because of the fact that you have stated, that you would retain the right of the longshoremen to bring a suit against the shipowner for negligence.

Mr. MITTELMAN. But that's the shipowner's negligence. If he was negligent because he prohibited the hold harmless clause, he would not be able to go back against the stevedore.

Mr. SCANLAN. Then you are saying basically that you would outlaw the indemnity action by the shipowner against the stevedore, which the Supreme Court came up with in the *Ryan* case.

In other words, you would say there could not be any indemnity between the shipowner and the stevedore. If there was shipowner's negligence and only shipowner negligence and it was not part of any unseaworthiness, it was not part of the duty to provide a safe place to work, then you would restrict, no question; this would cut down on a very substantial part of the third-party cases, and wherever there was shipowner negligence, as you have described it, and this is something that we have to look into as far as language is concerned, wherever there was shipowner negligence, then the shipowner could not bring an action against the stevedore for indemnity. That would be different from telling the stevedore that he couldn't enter into a contract. It would be as a matter of law that there wouldn't be any indemnity between the shipowner and the stevedore.

Mr. MITTELMAN. There is a precedent for this. I think it is section 236 of the New York State real property law, which prohibits an owner of a building from getting a hold harmless because from, say, the maintenance con-

tractor under which the maintenance contractor agrees to indemnify the owner of the building from the results of his own negligence. There is precedent for this sort of thing.

What I am getting at is a system that permits the third-party action and then prohibits the shipowner from coming back against the stevedore.

In the case where the stevedore was negligent, you wouldn't have any action against the shipowner because the stevedore's doctrine would be out.

Mr. SCANLAN. Any negligence on the part of the stevedore there would be covered under the Compensation Act.

Senator EAGLETON. Do I take it, so I understand his questions and your answers there, what he is postulating to you is, what I take it to be as garden variety typical workmen's compensation law; to wit, the employer provides for his immediate employee under workmen's compensation—whether negligence or not. And if there is third-party negligence, the employee proceeds against the third-party in a tort action.

Mr. MITTELMAN. That's correct.

Senator EAGLETON. That is standard Missouri variety workmen's compensation.

What do you think of that insofar as longshoremen's work is concerned?

Mr. SCANLAN. I think I have already told Mr. Mittelman that, first of all, we think to merely give the plaintiff protection, all third-party cases should be eliminated as in 525.

Senator EAGLETON. Do you really want to eliminate them when the third party is actually negligent? Not made absolutely liable for any situation but actual negligence on the part of the third party?

Mr. SCANLAN. We think, Mr. Chairman, that all cases against the shipowner, only against the shipowner, should be eliminated; and the reason for that is, *it is awfully difficult to try to limit negligence cases with respect to a shipowner where you have the maritime law such as it is.*

As far as the other type, the garden type variety——

Senator EAGLETON. *Can we not legislate "new maritime law" in this situation?*

Mr. SCANLAN. Yes; I think that's entirely possible.

Mr. Mittelman's suggestion certainly deserves consideration. I would like to . . . . see the language that Mr. Mittelman would suggest on that. *It is a matter of very careful draftsmanship to find the right language so that we don't find ourselves back with third-party cases all over again, not on the basis of unseaworthiness, but on the basis of maritime negligence, which some court is going to say is absolute liability, the same as unseaworthiness.* That's the problem, Mr. Chairman, that I am trying to direct my attention to.

Mr. MITTELMAN. The one point that I really was leading up to is that—you should treat this situation the same as a construction site where you have a number of different employees working on different contracts.

The typical situation—an employee of an electrical subcontractor is injured by a pipe dropped from three floors above by the employees of a plumbing subcontractor and then suing the plumbing subcontractor, if he can show negligence.

By the same token, except in a small minority of States, he does have the third-party action where he can establish negligence. I don't know that the maritime concept of negligence is very much different from the theory of negligence which is now applied by the courts on a construction

site where you have hazardous activities as well. I don't see the problem would be any more formidable in drafting something to take care of that situation than they would in the construction industry.

Mr. SCANLAN. I understand your point, Mr. Mittelman, and it is something that certainly deserves consideration.

Our view was, because of the peculiarities of maritime law, it would be better to eliminate all cases against shipowners and have the longshoremen given the right to sue anyone else except the shipowner.

(Emphasis added.)

APPENDIX H.

Civil Action No. 73-1120

ROBERT H. LUCAS

v.

"BRINKNESS" SCHIFFAHRTS GES.
FRANZ LANGE C. m.b.H. & CO K. G.

REPORT OF PRETRIAL CONFERENCE.
Tuesday, July 29, 1975.

TRIAL COUNSEL: Pf. Milton W. Borowsky
(Charles F. Love)
Df. E. Alfred Smith

(Milton Borowsky was not available for the conference due to a recent death in his family. Love was not thoroughly conversant with Borowsky's theories of liability and it was, therefore, determined that we would proceed in an informal fashion.)

Plaintiff suffered an injury on January 26, 1973 when he stepped on some dunnage. His foot went through and he fell against a roll of steel coil. Plaintiff was in the hold to discharge a cargo of steel I-beams. There were steel coils on top of the I-beams. The coils had to be moved to get to the beams. The cargo had apparently shifted at sea and the dunnage on which the coil had been resting had shifted also and some had broken in the process. Plaintiff's present claim (subject to refinement by Borowsky) of negligence on the part of the vessel is improper stowage.

Plaintiff initially lost eleven weeks from work ($3,498) and thereafter lost: 1973, 34 days at $50; 1974, 61 days at $50; 1975, from January 1 to May 9, 27 days. Plaintiff has been out from May 9, 1975 and presently expects to return to work August 4, 1975.

Defendant concedes that the cargo had shifted in heavy seas. The condition was open and notorious and the job was one which could and should have been easily done by experienced stevedores.

Parties are to conclude all discovery within 30 days.

Plaintiff's pretrial memorandum to be filed by August 11, 1975. Defendant's pretrial memorandum to be filed by August 29, 1975.

ALFRED L. LUONGO

J.

cc: To Counsel

Deputy Clerk